IN THE SUPREME COURT OF FLORIDA



MICHAEL SHELLITO,

Appellant,

v. CASE NO. 86,931

STATE OF FLORIDA,

Appellee.

_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE FOURTH JUDICIAL CIRCUIT
IN AND FOR DUVAL COUNTY, FLORIDA

# ANSWER BRIEF OF APPELLEE

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## STATEMENT OF THE CASE

The State would note that because the trial court merged the committed-during-a-robbery and the pecuniary-gain aggravators, the court "considered these as one aggravating circumstance" (R 394). In addition, the trial court found the prior-violent-felony aggravator. Except for this clarification, the State accepts Shellito's statement of the case.

## STATEMENT OF THE FACTS

### The guilt phase testimony

The State generally accepts Shellito's description of the testimony about the crime. For clarification, however, the State will offer a brief chronological summary of the evidence. In addition, because Shellito complains about the prosecutor's closing argument concerning the testimony of Shellito's mother, the State will offer an amplification and clarification of matters she testified to at the guilt phase. Finally, because Shellito complains about the admission of a prior consistent statement by State's witness Richard Bays, the State will more fully describe the pertinent facts relative to this issue.

Basic facts of the murder: Sometime after 10 p.m., August 30, 1994, someone broke into a pickup truck belonging to Kevin Keyes and stole his .380 semiautomatic pistol, also known as a .9

millimeter short (TR 385-87). In the early morning hours of August 31, 1994, Shellito left apartment 221 of Colonial Forest Apartments and returned with a gun bearing an inscription ".9 millimeter short," which Shellito claimed to have taken from a van or a truck (TR 422-25, 708-09). Apartment 221 is five to six miles away from Kevin Keyes' residence (TR 670).

At 4:00 a.m., Shellito again left apartment 221, with Stephen Gill and Sunshine Turner, to take Sunshine home. Just before they got to her home, Shellito exited the vehicle, claiming he needed to do some work to make money (TR 481-85). Sunshine asked him not to do anything this close to her house (TR 486).

About 4:30 a.m., the victim -- Sean Hathorne -- was murdered by the side of the road in the area where Shellito had exited Stephen Gill's vehicle (TR 461-63, 598-99). The murder scene was just over three miles from apartment 221 (TR 670-71), and about a half mile from Sunshine's home (TR 669). Stephen Gill picked Shellito up on his way back to apartment 221, where Shellito brandished his "dream gun" and bragged to several people about committing murder during a robbery. With pride (TR 760), he described how he had told the victim he was "out of gas," extended his arm straight out, and then shot the victim in the heart (TR 430-31, 705, 708, 711, 759).

In the early morning hours of September 1, 1994, police raided apartment 221. Shellito, still carrying his dream gun, exited by a back window (TR 563, 761). He was apprehended after a shootout (TR 577, 590). The gun he was carrying (TR 578, 590, 661-662, 814) was identified as the gun which had fired the shell casing found at the murder scene (TR 659, 813-14) and as the gun taken from Kevin Keyes' residence some 24 hours earlier (TR 386).

Mrs. Shellito's testimony about an alleged confession by Stephen Gill and other testimony pertinent thereto: Shellito's mother testified for the defense that "on or about the time" that her son was indicted, Stephen Gill stopped by to see her and told her he was sorry that her son had been indicted for murder, but that he was not "going to jail" (TR 962-64). She said, "What do you mean, Steve." He replied, "I killed the son of a Bitch but I'm not going to jail" (TR 964). On cross-examination, Mrs. Shellito acknowledged that she hardly knew Stephen Gill; his alleged visit was only the second time in her entire life she had ever met him (TR 966-67). She could not recall on what day of the week, or even in what month, Stephen Gill had confessed (TR 971-72). She initially testified that she had never reported this information to the police (TR 972). After further questioning on the subject of whether she had ever told the police that someone else had

confessed to a murder for which her son was facing a death sentence, she answered, "I didn't call . . ." but changed in mid-sentence to: "I called Goof or Goff," whatever the detective's name was, but he failed to return her call (TR 973). She then insisted that she had twice left messages for Detective Goff to call her because she had "something to tell him about the murder" (TR 974-76). She acknowledged that she had never gone to the police station with her story that Stephen Gill had confessed (TR 977, 979), and had told no one in the State Attorney's office until July 13, 1995 -- a week before trial (TR 980). She did claim that she earlier had told the Judge's "secretary" that someone else had confessed to the murder (TR 981-82). She was talking about "this woman sitting right here" (TR 982), who was in fact the deputy clerk assigned as a trial clerk to that courtroom (TR 1014-15). Mrs. Shellito talked to her about the murder, and it would have been "natural" for her to have mentioned that Stephen Gill had confessed (TR 983). She remembered that she "did bring up that Steve told me" (TR 983).

The clerk was called in rebuttal. She recalled a conversation with Mrs. Shellito that had taken place in the courtroom two months earlier (TR 1015). Mrs. Shellito talked about her son, his situation, and her distress about his situation, but, the clerk

testified, Mrs. Shellito never told her that her son was wrongly charged because someone else had confessed to the murder (TR 1017).

Shellito's father also testified that he had overheard the conversation between Stephen Gill and Mrs. Shellito about the murder in which Stephen Gill confessed that he had been the one who shot the victim (TR 998). He was absolutely positive that this conversation occurred in February, when "the charges were brought" (TR 1001, 1005).[1] He acknowledged that he had not reported this information to the authorities until a week before the trial, some five months after the confession allegedly occurred (TR 1003-04).

Detective Goff testified in rebuttal that he had spoken to Mr. and Mrs. Shellito an hour after Shellito was arrested on September 1, 1994 (TR 1021). He told them he worked for the Jacksonville sheriff's office, and he gave them his card (TR 1021). His only subsequent contact occurred on December 16, 1994, when Mrs. Shellito left him a message which contained no information other than a request that he call her (TR 1022). He went to their home a couple of days later. He was unable to get anyone to come to the door. Later, he tried calling but received no answer (TR 1022).

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[1]Shellito was indicted February 9, 1995 (R 1).

He testified that he had received no communications of any kind from Mrs. Shellito since December 16, 1994 (TR 1022-23).

Testimony pertinent to Richard Bay's prior consistent statement: Ricky Bays testified for the State about the events in apartment 221 from seven p.m. the evening before Sean Hathorne was murdered until the police raided the apartment (TR 419-20). The details reported by Mr. Bays on direct examination included these facts: Shellito left the apartment shortly after midnight, by himself, for an hour (TR 422); Shellito returned with a .9 millimeter pistol, which he claimed to have taken from a van (TR 424-25); Shellito left again at four a.m. with Sunshine Turner and Stephen Gill to take Sunshine home (TR 426); Shellito returned with Stephen Gill at 5:30 a.m. (TR 429); Shellito still had the gun with him, and he told Bays that he had shot someone with it (TR 430); Shellito stated that he had seen the victim walking down the street, that he shook the guy down and he had no money, so he shot him (TR 430); Shellito had looked in the victim's pockets and all he found were some papers (TR 431); Shellito still had the same gun at eleven p.m. the next evening (TR 433).

On cross-examination, Bays acknowledged that it was common in jail for prisoners to keep depositions, police reports and "things about people's case[s]" under the mattress (TR 440). Bays

acknowledged reading in the newspaper, while in jail, about this homicide (TR 445). He acknowledged that in a previous deposition he had testified that there were a "lot of things in the paper about this particular homicide" (TR 447).

Jabreel Street testified for the defense that he was in the same cell block with Richard Bays (TR 864). He claimed that Bays had contacted him about "jumping on a case" involving Shellito in exchange for cigarettes (TR 865, 868). He explained that "jumping" cases "means they will get little bits and pieces of information, put two and two together and then they will call the State Attorney . . . . And once they talk to the State Attorneys, usually their story will coincide with whatever the State Attorney has in their files" (TR 864-65). Street saw paperwork with Shellito's name on it, which he understood were "police reports and things of that nature" that Bays had obtained from his mother (TR 865-66). Details of Shellito's case, Street testified, were furnished to him, but since Street "wasn't looking at no major time ... [there] wasn't no need for me to jump on the case" (TR 867).[2]

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[2]On cross-examination, Street acknowledged that he had reasons to dislike Bays, and reported that the "details" furnished to him included the defendant being in a van (instead of being taken to the scene in Stephen Gill's pickup truck), the victim being part of a group riding bicycles (instead of being by himself on foot), and the defendant shooting the victim in the

Over defense objection, the State elicited testimony from Detective Hinson about a prior consistent statement Bays had given to police at four a.m. on September 1, 1994, when Bays had only been in custody for a few hours and had no access to police reports about the murder (TR 622).[3] In fact, no homicide reports had even been written at that time, and no arrests had been made in the homicide case (TR 622-23). Bays' statement was consistent in all material respects with his trial testimony (TR 623-25).

The penalty phase evidence

The State generally accepts Shellito's recitation of the penalty phase evidence, subject to the following amplification.

As noted in Shellito's statement of facts (Initial Brief of Appellant at 21-22), defense counsel moved for a mistrial following testimony from the victim's mother, claiming that both she and a woman in the audience had cried during her testimony (TR 1342). The trial judge did not see the victim's mother cry while testifying, and did not see the person in the courtroom defense counsel had referred to, but he did note that Mrs. Shellito had been "looking around, pushing her head up and down, jerking, frowning, making

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head (instead of the chest) (TR 876-77).

[3]Bays had been arrested in the same raid that netted the defendant, on armed robbery charges (TR 415, 433).

faces at the witnesses for the state and that sort of thing." The trial judge denied the motion for mistrial but offered to, and did, instruct the persons in the courtroom to restrain themselves (TR 1343-44, 1346).[4]

Shellito's accounting of the testimony of his brother, sister, mother and father is essentially correct as far as it goes; the State, however, would supplement Shellito's presentation as follows:

Michael Shellito's brother Joseph testified that Michael Shellito "was very quick on learning things and he took to mechanical repair really good" (TR 1357). Michael played in Pop Warner baseball for a year and "did rather well" (TR 1357). Michael is a "very loving person," very "caring," very "protective of his family" (TR 1358). Michael "loves the people that he loves, he loves them deeply . . . . it's not hard for him to like anybody" (TR 1358). Joseph was raised in the same household as Michael (TR 1359). Joseph learned from home not to lie, to cheat or to kill

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[4]Shellito himself ignored this admonition. During Richard Bays' penalty phase testimony, Shellito interrupted to say: "Man, that's shit, man" (TR 1313). Following the return of the jury's 11 to one advisory recommendation of a death sentence, Shellito threw a roll of toilet paper at the jury, telling the jury: "Mother fucker, mother fucker, shit, you can kiss my mother fucking ass, too" (TR 1514). Then he told the judge, "Your family suck my dick" (TR 1515).

(TR 1362). Joseph graduated from high school with honors, joined the military afterwards, and has been working ever since (TR 1362).

Michael Shellito's sister Rebecca testified that their father began beating on Michael when he was eight or nine (TR 1370). She also claimed that their father hit both her and her mother (TR 1371). The only two specific incidents involving Michael she testified to occurred: (1) during an argument when Michael was 16 or 17 and had returned home after having been out all night, the father punched Michael in the mouth (TR 1371-72); and (2) during another argument, the father pushed Michael into a wall (TR 1377). When asked on cross-examination if her brother Joseph had been absent every time Michael had been physically abused, Rebecca answered, "if Joseph doesn't remember that's not my problem" (TR 1377). She acknowledged that she had been raised in the same household as Michael, and was taught not to lie, to steal or to kill (TR 1377-78). She graduated from high school, went on to business college, and has been working at Southern Bell for over three years (TR 1378).

Michael Shellito's father acknowledged that he had an alcohol problem, but testified he had received an honorable discharge from the Navy in 1982 and was now employed as a security guard (TR 1384). He has always made a decent living (TR 1392-93). He

recalled the two above-mentioned incidents when he used physical force against Michael, but he claimed those were the only two times he had ever used force against him (TR 1390-91). He explained that Michael is very "hyper" and when he gets excited "you just can't talk to him" (TR 1391). Moreover, Michael always had to have things his way (TR 1392). He explained the incident in which he had struck Michael this way: "Well, I was asleep and . . . he got in an altercation with his mother and when I . . . came out of the bedroom and I was afraid he was about ready to strike her and I stepped between them" (TR 1386). Michael was "screaming" at his mother and Mr. Shellito feared for her safety; Michael had threatened her in the past; when he tried to intercede to calm things down, Michael made a fist at him and Mr. Shellito thought Michael was going to hit him (TR 1391). When asked if it was true that Michael did not want to work, Mr. Shellito testified that it was hard to say; Michael has had jobs given to him, but for "one reason or another" he could not keep them (TR 1393), even though he has strong mechanical abilities (TR 1399). Mr. Shellito acknowledged, however, that he has said in the past that "Michael didn't want to work" (TR 1393). He acknowledged that Michael had been in legal trouble before, and that once his legal troubles

started, they "snowballed" (TR 1395-96). Mr. Shellito tried to warn him what might happen, but Michael would not listen (TR 1396).

Mrs. Shellito testified that she divorced her husband for three months in 1975 because he slapped her face (TR 1401). That incident was the one and only time in their marriage when he used physical force on her (TR 1426-27). He never had struck any of the children except for the two incidents with Michael (TR 1426). When asked if Michael had ever threatened her with violence, she acknowledged only that he had pushed her "once" (TR 1425). But she did not think Michael was capable of committing robbery, let alone murder, and she did not believe that he even was present at the scene of this murder (TR 1423). She testified that she allowed Michael to have over 30 pets, including hamsters, rabbits, dogs, cats and a couple of snakes -- and that the family had the financial means to feed all of these pets (TR 1423-24). She acknowledged giving him money to spend nights in motels with older women (TR 1436-37). She acknowledged that after the incident in which Michael had choked on milk when he was five days old, he had been given check-ups every year and "they" would tell her the defendant was fine (TR 1437-38). She acknowledged that despite his problems in school, Michael is capable of writing well (TR 1430). She refused to acknowledge the accuracy of school and medical

records indicating that she had told Michael's kindergarten teachers that there were no problems at home and that his school difficulties were because he was immature (TR 1438), or that she had given a medical history in 1988 indicating that Michael had no special medical problems (TR 1440), or that she had told Charter Hospital in 1991 that she had a normal pregnancy and that Michael had no history of serious illness (TR 1440). She claimed to be unaware that school records indicated that Michael's ability to reason, to organize and to proceed was average (TR 1439). Mrs. Shellito blamed Michael's legal trouble on "peer pressure" (TR 1432). She acknowledged, however, that most of her son's codefendants when he had been in trouble had been younger than he (TR 1433). She acknowledged that he had been arrested in 1993 for aggravated assault and had spent a year in jail, and that he had been released in April of 1994, less than five months before the August 31 murder and robberies (TR 1435-36).

The State would note that although the trial court granted the defense motion for psychiatric evaluation (R 17-19), no mental health expert witness testified. Instead, defense counsel introduced certain school records (Defendant's exhibit 1), certain hospital records, including an October 1991 psychiatric evaluation (Defendant's exhibit 2), and a report from a psychiatrist who

evaluated Shellito in November 1991 (Defendant's exhibit 3). Exhibit 1 indicates that Shellito had behavioral problems in kindergarten, but was functioning apparently at least within the low-average range of general intelligence, although his unwillingness to cooperate with the tester rendered the test results of "limited predictive value" (Defendant's Exhibit 1, pp 3-4). His behavioral problems were described on September 18, 1980, as including the refusal to do assigned tasks, throwing temper tantrums, and physically attacking other students. Id. at 5.[5] He was described as a "danger and a nuisance to other children." Id. at 7. His behavior problems moderated during the year, but his behavior remained poor throughout his kindergarten year. Id. at 9. As a consequence, he ultimately was placed in a class for emotionally handicapped students in April of 1982. Id. at 11. Because of continuing behavioral difficulties, Shellito was referred in April of 1983 to the school psychology services unit for evaluation. Id. at 23. Both his verbal and performance IQ scores were at a low average level, as were his scores in most of the tested areas, except for demonstrated weaknesses in "ability to

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[5]Defendant's Exhibit 1 is not numbered after page 4. References to page numbers past page 4 refer to unnumbered pages in the order in which they appear in the exhibit, which is in the custody of this Court.

sequence pictures" and to "copy abstract symbols" (the latter of which indicated anxiety). Id. at 24. Shellito also exhibited withdrawal tendencies and inability to plan and organize materials. Id. at 25. By 1986, although Shellito was having difficulty with reading assignments, he was now described as being "appropriately groomed, well-liked by the other students and . . . helpful and trustworthy. Id. at 29. In 1989, when he was 13, Shellito was again referred to the school psychology services unit for psycho-educational assessment. Id. at 14. The examiner reported that she established "rapport" with Shellito, but that the degree of effort he put forth was "questionable." Therefore, she opined, "the results of this evaluation are considered to be a low estimate of his true potential for learning." Id. at 15. On a test of general intelligence, Shellito earned a verbal score of 69, a performance score of 90 and a full scale IQ score of 78. Ibid. The significantly higher performance score, coupled with the average scores obtained on tests measuring receptive language and short-term auditory memory, indicated that "the performance score is the best indicator of Michael's intellectual potential." Id. at 17. In the examiner's opinion, "his cognitive capacity falls in the Average range of functioning." Ibid. Achievement testing scores administered between 1983 and 1990 (Id. at pp 30-36) show a wide

variation in achievement (or at least in test-taking effort). In 1984, all of his achievement scores were below average. Id. at 31. In other years, many of his scores were not only average, but above average. In 1985, for example, his vocabulary, listening comprehension, number concept and total auditory scores were significantly above average. Id. at 32.

In October of 1991, Shellito was evaluated by a psychiatrist at the HCA Grant Center Hospital for "aggressive behavior [and] homicidal and suicidal threats," after he was arrested for trespassing. The charges were dropped when he was admitted to the hospital. Defense Exhibits 2 and 3. In November of 1991, following his release from the hospital, he was evaluated by a Dr. Mullen. Defendant's Exhibit 3. Dr. Mullen noted that, according to Shellito's parents: "He does not listen to anyone. Gets mad quickly and gets in trouble. Trouble in school; talks back at teachers. Problems with the law." Dr. Mullen reported Shellito's legal history as: "Dating back to age 13 when he was accused of trespassing and stealing motorcycles. Last August he was arrested for arson and burglary. He is said to have started a fire at the ministorage. Truancy. Fights have led to stay at DDC." Dr. Mullen reported that Shellito was cooperative, appeared to be in good contact, was well oriented in all areas, and showed no signs

of psychosis. Shellito denied feelings of depression and thoughts of homicide or suicide. His concentration and memory were not impaired, and his intelligence appeared to be average or perhaps low average. His insight was questionable and his judgment was fair. Dr. Mullen's progress notes reflect that Shellito showed up for scheduled appointments only once, and his case was closed on March 23, 1992, after she had not heard from him since the previous January.

## SUMMARY OF THE ARGUMENT

There are nine issues on appeal: (1) Evidence of Shellito's flight when police entered his apartment was properly admitted to show consciousness of guilt of the offense of murder even though he also had committed two armed robberies after committing murder. Furthermore, in light of the fact that Shellito fled with the murder weapon, the evidence of flight and the arrest soon thereafter was admissible to show the circumstances surrounding the recovery of the murder weapon. (2) Because the defense raised an issue of recent fabrication by State witness Ricky Bays, based on information Bays allegedly acquired from newspaper articles and police reports while in jail, the State properly was allowed to rebut the inference of recent fabrication by showing that he had made a prior consistent statement at a time when those newspaper articles and police reports did not exist. (3) No objection to the prosecutor's guilt phase argument has been preserved for review. Moreover, the prosecutor's argument that Mrs. Shellito was a liar was based upon the evidence. (4) There was no objection at trial to any portion of the prosecutor's penalty phase argument complained about on appeal. The prosecutor's reference to Shellito's lack of remorse was not fundamental error. Lack of remorse was simply a reasonable inference from proof that Shellito

committed two additional robberies shortly after committing murder, and was properly argued in rebuttal to defense mitigation testimony that Shellito was a loving, caring person whose act of murder was an aberrational act inconsistent with his general character. The remaining comments complained about for the first time on appeal, even if objectionable, do not amount to fundamental error. (5) Pecuniary gain was clearly a motive for the criminal episode resulting in murder. Therefore, the pecuniary gain aggravator was properly found even if the murder did not occur until after Shellito determined that the victim had no money. Even if error, however, the pecuniary gain finding is harmless because it merged with the robbery aggravator. (6) and (7) The standard penalty phase jury instructions delivered by the trial court were sufficient and not improperly burden-shifting. Shellito's requested instructions seeking definition of mitigation and identification of nonstatutory mitigators were properly refused. (8) The trial judge considered all the mitigation evidence proffered by the defense, and the weight he assigned to mitigation was a matter within his discretion. There was no abuse of discretion here. The evidence does not support Shellito's claim that he has organic brain damage or that his intelligence is borderline, and his family background was not especially deprived.

(9) The death penalty is an appropriate sentence for a defendant who, while on parole after having committed a violent felony, stole a gun and then used that gun to commit three armed robberies, one murder, and an aggravated assault on a police officer while resisting arrest. Shellito's demonstrated history of criminal behavior belies any notion that his crime spree of August 30-September 1, 1994, was aberrational behavior in Shellito's life.

## ARGUMENT

### ISSUE I

SHELLITO'S ATTEMPTED FLIGHT WHEN THE POLICE RAIDED HIS APARTMENT LESS THAN 24 HOURS AFTER THE MURDER, AND HIS ARREST WHILE STILL IN POSSESSION OF THE MURDER WEAPON WERE CIRCUMSTANCES PROPERLY INTRODUCED INTO EVIDENCE

In his first issue, Shellito complains about the introduction of testimony concerning the circumstances of his arrest, including his attempt to flee.

Shortly after midnight on September 1, 1994, some 20 hours after the victim was murdered, and not long after Shellito had been bragging about the murder to other occupants of the apartment, the police burst in. Shellito was in a back bedroom (TR 710, 760). Shellito "kind of freaked out a little bit and jumped up on the bed and pulled the headboard down on the bed, opened the window, kicked out the screen and jumped out" (TR 761). Officer Hurst of the canine division of the sheriff's office (TR 559-60) was waiting with his dog behind the apartments (TR 562). Just after Hurst heard the police entering the front of the apartment, he saw Shellito rip the blinds out of a back window, pull the window up, push out the screen, and exit the apartment (TR 563). Hurst ordered him to stop or he would release the dog (TR 564). Instead of stopping, Shellito "put it in overdrive" and "took off" (TR

565). Hurst released the dog, who chased and caught the defendant (TR 566). Hurst ordered Shellito to stop resisting and told him to show his hands (TR 567). Shellito had a gun in his hand (TR 567-68) which he proceeded to aim at officer Hurst (TR 573). Hurst began shooting. Shellito rose and began running toward a road leading out of the apartment complex (TR 573). Hurst and another officer who had run to the scene continued shooting at Shellito and brought him down (TR 577, 588). The second officer testified that, had Shellito succeeded in running past him, Shellito would have "broke our perimeter," gotten out of the complex and gotten away (TR 588). The gun recovered from the defendant was identified as the murder weapon (TR 662, 813).

As Shellito acknowledges, it is well settled that:

> When a suspected person in any manner attempts to escape or evade a threatened prosecution by flight, concealment, resistance to lawful arrest, or other indications after the fact of a desire to evade prosecution, such fact is admissible, being relevant to the consciousness of guilt which may be inferred from such circumstance.

Straight v. State, 397 So.2d 903, 908 (Fla. 1981).[6] In Straight, this Court held that evidence of the defendant's flight from police and his attempt to avoid arrest by firing at the arresting officers was properly admitted because it was "relevant to the issue of his guilty knowledge and thereby to the issue of his guilt." Ibid. Straight seems to be right on point. Shellito contends this case is different, however, because he committed two armed robberies after the armed robbery/murder which was the subject of this trial. Citing United States v. Myers, 550 F.2d 1036, 1049 (5th Cir. 1977) and Merritt v. State, 523 So.2d 573 (Fla. 1988), he argues that he might have fled to avoid prosecution for the subsequent robberies rather than for the earlier murder. In both Merritt and Myers, however, there was a significant delay (years even) between the commission of the crime and the flight, during which interval the defendant committed unrelated crimes in other states. The probative value of the flight evidence was weakened by this delay. United States v. Borders, 693 F.2d. 1318, 1325 (11th Cir. 1982). In this case, the flight occurred less than 20 hours after the

[6]In Fenelon v. State, 594 So.2d 292, 294-95 (Fla. 1992), this Court confirmed the continuing value of evidence of flight in criminal prosecutions; Fenelon merely restricted the trial judge from improperly emphasizing such fact by commenting on it in the instructions to the jury.

murder. Even if Shellito was guilty of crimes other than murder, it is still reasonable to infer that he fled to avoid apprehension for murder. This Court has rejected an argument that the State may introduce evidence of flight only if the defendant had no reason to flee other than guilty knowledge of the crime on trial. Bundy v. State, 471 So.2d 9, 20-21 (Fla. 1985). Unlike Shellito, who was not wanted for any unrelated crimes committed prior to the murder, Ted Bundy was wanted for escape and homicide in Colorado and was a suspect in thirty-six sex-related murders in the northwest United States when he successfully fled from one officer two days after the Florida murder at issue and attempted to flee from another officer four days later. Id. at 11-12. Nevertheless, this Court held that it was reasonable to infer that his two attempts at flight, coming as they did within days of the crime on trial, demonstrated his consciousness of guilt of the crime on trial, and therefore were properly admitted. Id. at 21. Likewise, in Freeman v. State, 547 So.2d 125, 128 (Fla. 1989), this Court held that, where the accused was in custody on two separate murder charges, it was reasonable to infer that his escape attempt was an effort to avoid prosecution for both offenses, and that the flight evidence properly was admitted. In this case, the murder and the subsequent armed robberies were all committed within a 20-hour period in close

geographical proximity, and they were all committed with the same weapon. Even if Shellito might have wanted to escape apprehension for the two armed robberies he had committed within the previous 20 hours (and he very likely did), it is reasonable to infer that he also wished to elude prosecution for the more serious crime of murder that he had committed within that same previous 20 hours, and that he had been bragging about shortly before his arrest.[7]

It has been held that flight evidence carries with it a strong presumption of admissibility. United States v. Lacey, 86 F.3d 956 (10th Cir. 1996). And this is so even if reasons other than consciousness of guilt might have supported the defendant's decision to flee. United States v. Hernandez-Miranda, 601 F.2d 1104 (9th Cir. 1979). Although the probative value of flight evidence is diminished "if the defendant has committed several unrelated crimes or if there has been a significant time delay between the commission of the crime or the point at which the

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[7]Shellito also suggests for the first time on appeal (see TR 339) that Shellito might have fled because there was marijuana in the apartment. Not only was this argument not raised below, the manner in which Shellito resisted arrest is more consistent with guilty knowledge of murder than with guilty knowledge of marijuana possession. Cf. Mackiewicz v. State, 114 So.2d 684, 689 (Fla. 1959)("There can be no doubt that the manner in which an arrest is resisted . . . has some bearing on the weight to be given by the jury to such evidence").

accused has become aware that he is the subject of a criminal investigation, to the time of the flight," the "ultimate decision on admissibility of flight evidence rests with the trial judge, whose exercise of discretion will not be overturned absent a showing of clear abuse." United States v. Blakely, 960 F.2d 996, 1000-1001 (11th Cir. 1992)(holding that flight evidence was properly admitted even though the flight occurred three years after the commission of the crime and the defendant was wanted in another jurisdiction for an unrelated crime).

Based on the foregoing analysis, the State would contend that evidence showing the circumstances surrounding Shellito's arrest, including his attempt to flee and to resist his arrest, was properly admitted to show consciousness of guilt. In addition, however, this evidence was admitted properly for another reason, not addressed on appeal by Shellito: Shellito did not just flee when the police entered his apartment, he fled with the murder weapon. The fact that Shellito was in possession of the murder weapon less than 20 hours after the murder was highly relevant to prove his guilt of the offense of murder, and the State was entitled to prove this fact, by proving the circumstances

surrounding the recovery of that weapon, as the State argued at trial (TR 338, 341).[8]

For all the foregoing reasons, the trial court did not err in allowing the State to present evidence of Shellito's arrest.

## ISSUE II

BECAUSE THE DEFENSE RAISED AN ISSUE OF RECENT FABRICATION, THE TRIAL COURT PROPERLY ALLOWED THE STATE TO PRESENT EVIDENCE OF RICKY BAYS' PRIOR CONSISTENT STATEMENT; EVEN IF BAYS HAD THE MOTIVE TO FABRICATE BEFORE HE MADE HIS PRIOR STATEMENT, HE DID NOT HAVE THE OPPORTUNITY TO FABRICATE UNTIL AFTER HE MADE THE PRIOR STATEMENT

Shellito acknowledges that under § 90.801(2)(b) Fla. Stat. (1995), a prior consistent statement of a witness may be offered to rebut an express or implied charge against the witness of improper influence, motive or recent fabrication. See, e.g., Jackson v. State, 599 So.2d 103, 107 (Fla. 1992). He apparently concedes that his cross-examination of State's witness Ricky Bays contained the requisite suggestion of recent fabrication or improper motive or influence, but argues that the hearsay exception contained in §

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[8]The defense offered to stipulate to the recovery of the murder weapon. The State is not required, however, to accept such offers to stipulate. Parker v. State, 408 So.2d 1037, 1038 (Fla. 1982). Cf. United States v. Peltier, 585 F.2d 314 (8th Cir. 1978)(stipulation of fact of flight, barren of any detail, would have robbed government of most of the probative value of the flight evidence).

90.801 (2)(b) does not apply here because "the motive to fabricate arose before the prior consistent statement was made." Initial brief of Appellant at pp. 40-41.

As Shellito points out, Bays was under arrest for armed robbery when he gave the prior consistent statement at issue. Therefore, Shellito argues, any motive to falsify existed at that time. However, it has been held that the motive to falsify does not arise merely because the police are investigating a crime, even if the witness has been arrested and charged with the crime prior to the statement. Edwards v. State, 662 So.2d 405, 406 (Fla. 1st DCA 1995). Bays was arrested during the same raid which netted Shellito, on armed robbery charges unrelated to the murder (TR 415, 433). Bays told the police about Shellito's activities and his statements about the murder within four hours of his arrest, at a time when no arrests had been made in the murder case, and no police reports had even been written about the murder (TR 622-23). There is no indication in the record that Bays was in any way involved in the murder of Sean Hathorne. Moreover, even at the time of the trial, Bays had no plea agreement with the State with regard to his robbery charges, and he did not know what his sentence might be (TR 434-35). There is no indication in the record that Bays had ever engaged in any plea negotiations with the

State; he had simply entered a plea of not guilty and was awaiting trial on his charges (TR 436, 439). Here, as in Rodriguez v. State, 609 So.2d 493, 500 (Fla. 1992), "the statements in question were given prior to the plea negotiations and therefore prior to the existence of . . . [a] motive to fabricate." Accord Stewart v. State, 558 So.2d 416, 419 (Fla. 1990)(where defense attempted to discredit testimony by implying that witness was motivated by hope of favorable treatment at sentencing, prior consistent statement was admissible because the alleged reason to falsify did not exist when witness gave prior consistent statement to law officer before witness was convicted, while no sentences were pending).

But even if it is assumed, arguendo, that Bays had a motive to falsely implicate Shellito in the murder from the moment Bays himself was arrested, the State does not agree with Shellito's contention that a prior consistent statement is never admissible unless it is given before the motive to fabricate arose. The test of admissibility is whether the prior consistent statement was made "before the existence of the facts said to indicate an improper influence." Lazarowicz v. State, 561 So.2d 392, 393 (Fla. 3d DCA 1990). If the fact alleged to indicate an improper influence was motive to fabricate, then the prior consistent statement would have to have been made before the motive to fabricate arose. Jackson v.

State, 498 So.2d 906, 909-10 (Fla. 1986). But if some other fact is the basis of attack on the credibility of the in-court testimony, then the critical inquiry is whether the prior consistent statement preceded that fact. E.g., State v. Jones, 625 So.2d 821 (Fla. 1993)(proper to admit prior consistent statement made before witness talked to prosecutor where defense questioning implied that the prosecutor had told the witness what to say). In this case, the point of the cross-examination was not simply that Bays had an improper motive, it was that Bays had the opportunity to fabricate because he had access to police reports and detailed newspaper articles while in jail. The cross-examination suggested that what Bays knew about the murder came from these police reports and newspaper articles, and not from having heard Shellito talk about the murder. As the trial court recognized, the cross-examination gave rise to an "inference of recent fabrication based on information obtained" (TR 608).[9] Therefore, the trial court

[9] During the hearing on the admissibility of Detective Hinson's testimony, defense counsel indicated that, supplementary to his cross-examination of Bays, he would present further testimony about the papers under Bays' mattress at jail. As noted in the statement of facts, Bays' cell mate Jabreel Street did testify for the defense about police reports with Shellito's name on them that Bays allegedly had obtained from his mother, and about "jumping" cases. This testimony was presented after the trial court ruled that Detective Hinson could testify for the State regarding the prior consistent statement, but it does

concluded, "it's proper for [Detective Hinson] to be asked about [Bays'] prior consistent statement," made before Bays had access to this information (indeed, before it even existed), to rebut the inference of recent fabrication based on the acquisition of that information (TR 617-18).

"[Q]uestions concerning the admissibility of extrajudicial statements for the purpose of rehabilitating witnesses impeached by the inference of a recent motive to fabricate are largely addressed to the sound discretion of the trial court, and are not to be reversed in the absence of a prejudicial abuse of discretion." Kelly v. State, 486 So.2d 578 (Fla. 1986). The trial court committed no abuse of discretion in concluding that Shellito's trial counsel had raised an issue of recent fabrication in his cross examination of Ricky Bays, which the State was entitled to rebut with testimony that Bays had given a prior consistent statement before he reasonably could have had access to information about the crime from any source other than Shellito himself. See, Ferrell v. State, 21 Fla. L. Weekly S 388, 389 (Fla. September 19,

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corroborate the trial court's assessment of the purpose the defense cross-examination of Bays. See, cf., Lawhorne v. State, 500 So.2d 519 (Fla. 1986)(approving, in context of impeachment by prior convictions, use of "anticipatory rehabilitation" to "'soften the blow' of anticipated inquiries or revelations expected to be damaging to the credibility of the witness").

1996)(noting that cellmate's testimony about Ferrell's confession contained details that had not been released to the public); and Hartley v. State, 21 Fla. L. Weekly S391, S392 (Fla. September 19, 1996)(same).

Should this Court disagree with any of the foregoing, however, any error was harmless. Bays testified on direct examination, without objection, that he had given police a sworn statement after his arrest, in which he told the police what Shellito had told him about the murder (TR 433-43). He again testified about his prior statement on cross-examination, at the behest of defense counsel (TR 450-52). Thus, before Detective Hinson ever testified, the jury knew that Bays had given a statement in which he told police what Shellito had told him about the murder. To at least some extent, therefore, Detective Hinson's testimony was cumulative to testimony presented without objection. Furthermore, even if Bays' testimony was bolstered improperly, he was only one of three witnesses to whom Shellito had bragged about committing murder, and the other two provided additional details about the murder.[10] In

[10]Lateria Copeland testified that Shellito had told the victim he was "out of gas" and had demonstrated how he shot the victim by extending his hand straight out and shooting him in the heart (TR 708, 710-11). Theresa Ritzer testified that Shellito had also described to her that he had told the victim that he was "out of gas" (TR 759). In addition, Shellito described for her

addition, the evidence showed that Shellito was the one who had been dropped off at the scene of the crime after announcing that he had work to do, and that Shellito was the person who had stolen the murder weapon and who was in continuous possession of the murder weapon from the time he stole it until he was arrested. Any impermissible bolstering of Ricky Bays' testimony did not taint the jury's guilty verdict. Caruso v. State, 645 So.2d 389, 395 (Fla. 1994)(erroneous admission of prior consistent statement harmless beyond a reasonable doubt when viewed in light of all the evidence in the record).

## ISSUE III

THERE WAS NO OBJECTION WHATEVER TO THE PROSECUTOR'S GUILT-PHASE CLOSING ARGUMENT, AND THIS ISSUE IS NOT PRESERVED; MOREOVER, THE PROSECUTOR'S ARGUMENTS ABOUT THE CREDIBILITY OF MRS. SHELLITO WERE BASED UPON THE EVIDENCE AND WERE NOT FUNDAMENTALLY UNFAIR

During the prosecutor's closing argument, he stated: "Mrs.. Shellito is either an extremely distraught concerned mother or she's a blatant liar. I think she's probably a little bit of both" (TR 1100-01). Shellito contends this argument was improper in two respects. First, he contends it was an improper expression of the prosecutor's personal belief as to Mrs.. Shellito's credibility.

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how the victim's light blue shirt turned dark blue after he was shot (TR 759-60).

Second, he contends that Mrs.. Shellito's testimony was so unimpeachable that any adverse comment on her credibility was improper.

Shellito acknowledges that trial counsel did not object to the prosecutorial argument at issue here. Initial brief of appellant at 44. In fact, trial counsel did not object to any portion whatever of the prosecutor's guilt-phase closing argument. Nevertheless, Shellito argues that the argument at issue here was fundamental error requiring reversal despite the lack of any objection below. The State does not agree.

"The proper procedure to take when objectionable comments are made is to object and request an instruction from the court that the jury disregard the remarks." Duest v. State, 462 So.2d 446, 448 (Fla. 1985). "A failure to object to improper prosecutorial comment will preclude review, unless the comments were so prejudicial as to constitute fundamental error." Pacifico v. State, 642 So.2d 1178, 1182 (Fla. 1st DCA 1994). Accord, Pangburn v. State, 661 So.2d 1182, 1187 (Fla. 1995); Suggs v. State, 644 So.2d 64, 68 (Fla. 1994); Wyatt v. State, 641 So.2d 355, 359 (Fla. 1994). Fundamental error exists only if any "error committed was so prejudicial as to vitiate the entire trial." State v. Murray, 443 So.2d 955, 956 (Fla. 1984).

Shellito correctly notes that it is inappropriate for a prosecutor to express his or her personal belief as to the credibility of a witness. Considered in isolation, the quoted portion of the prosecutor's argument might be interpreted as such a comment. Had Shellito timely objected, the trial court might have directed the prosecutor to rephrase his comment. But trial counsel did not object, which is a strong indication that trial counsel, at least, did not interpret this remark as an improper expression of personal belief. See, Williams v. Kemp, 846 F.2d 1276, 1288 (11th Cir. 1988) (fact that no objection was made at trial is relevant indication that argument was not fundamentally unfair); Donnelly v. De Christoforo, 416 U.S. 637, 647, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974)("a court should not lightly infer that a prosecutor intends an ambiguous remark to have its most damaging meaning or that a jury, sitting through lengthy exhortation, will draw that meaning from the plethora of less damaging interpretations"). In fact, this isolated comment aside, the entire thrust of the prosecutor's argument was that the jury would determine whether or not to believe the witnesses, based on their testimony and the variety of credibility-of-witness factors that the trial judge would explain in his instructions to the jury.

Even if portion of the prosecutor's argument at issue here might have been subject to some objection not made, there was no impropriety serious enough to "vitiate the entire trial," State v. Murray, supra, for several reasons. First of all, regardless of the phraseology of the single comment now complained of, the prosecutor did not refer to matters not in evidence, Pacifico v. State, supra, or ask the jury to submit to the "mantle of prosecutorial authority." Brooks v. Kemp, 762 F.2d 1383, 1413 (11th Cir. 1985). Instead, the prosecutor specifically admonished the jury that: "I am no in anyway trying to imply anything more than what you heard from the witness stand" (TR 1076), and reminded the jury that it was the jury's task to judge the credibility of the witnesses based upon appropriate considerations: "you judge defense witnesses and state witnesses by the same rules, opportunity to see and know, motive to lie, what was the demeanor like;" (TR 1091-92), "you listen to them . . . weigh their evidence and look at everything else, how it's corroborated by the scientific evidence in this case, how it's corroborated by each other" (TR 1096).

Secondly, the prosecutor did not simply comment upon Mrs. Shellito's credibility, he expressly laid out for the jury those factors in evidence which the jury could consider in determining

whether her testimony that Stephen Gill had confessed was worthy of belief. He argued that one factor relevant to credibility of a witness is any interest the witness may have in the outcome of the case. Mrs. Shellito, he argued, "had the most interest in the outcome of this case of any [witness] you heard" (TR 1101). The prosecutor noted that Mrs.. Shellito had only met Stephen Gill once (and had barely talked to him then) before he supposedly stopped by her house and "casually" confessed to murder (TR 1101). Moreover, Gill supposedly had told Mrs.. Shellito that his lawyer knew he was guilty but could not tell anyone because of the attorney-client privilege, yet his "confession" to Mrs.. Shellito obviously was not protected by any such privilege, as Gill must have known (TR 1101-02). Thus, his "confession" to her would have been "just stupid" (TR 1102). Furthermore, Mrs.. Shellito had made inconsistent statements about what Stephen Gill actually had said, and could not remember "when this guy supposedly, who she's seen twice in her life comes in and tells her that somebody else did this murder" (TR 1102-03). She could not even remember what "month" it was, or the "day of the week" (TR 1104). Nor had she reported this alleged confession to the police, as would have been natural, if someone else actually had confessed to a capital offense that her son was charged with (TR 1103). The prosecutor also pointed out the Mrs..

Shellito's testimony was contradicted in several important respects by the testimony of the deputy clerk and of Detective Goff (TR 1106-07). She claimed to have tried twice to contact Goff, after Gill supposedly confessed. But although Mrs.. Shellito could not remember what month this confession supposedly occurred, she did remember that it was after Shellito was indicted. Shellito was indicted in February, 1995 (R 1), which is consistent with Mr. Shellito's testimony that the conversation had occurred in February when "the charges were brought" (TR 1001, 1005). Goff, however, testified that he had received only one message from Mrs. Shellito, in December, and that he never heard from her again. As the prosecutor argued: "That's not what Mrs.. Shellito said" (TR 1107). Mrs.. Shellito also claimed to have told the deputy clerk that someone else had confessed, but this testimony was contradicted by the testimony of the deputy clerk, as the prosecutor pointed out (TR 1106). It is inaccurate to claim, as Shellito now does, that Mrs.. Shellito's testimony "was not impeached." Initial Brief of Appellant at 44. On the contrary, her testimony was subject to attack on many grounds, and her lack of credibility was a proper subject for closing argument. Craig v. State, 510 So.2d 857, 865 (Fla. 1987).

Third, defense counsel also emphasized that closing arguments by counsel are not evidence (TR 1109), and that the jury would weigh the evidence and evaluate the credibility of witnesses pursuant to criteria that would be furnished by the court (TR 1119-20, 1143). See Brooks v. Kemp, supra at 1415 (closing argument by defense relevant to whether or not jury was misled by prosecutor's argument). Defense counsel countered prosecutorial arguments about witness credibility with his own arguments about the credibility of witnesses (e.g., "talk about liars, let's talk about Stephen Gill" TR 1136). Finally, the trial court properly instructed the jury that credibility of witnesses was a matter for the jury to determine, based on various criteria which the court furnished to the jury.[11]

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[11]The Court instructed the jury: "Now it's up to you to decide what evidence is reliable. You should use your common sense in deciding which is the best evidence and which evidence should not be relied upon in considering your verdict. You may find some of the evidence not reliable or less reliable than other evidence. You should consider how the witnesses acted as well as what they said. Some of the things which you should consider are: Did the witness seem to have an opportunity to see and to know the things about which the witness testified, did the witness seem to have an accurate memory, was the witness honest and straightforward in answering the attorney's questions, did the witness have some interest in how the case should be decided, does the witness' testimony agree with other testimony and other evidence in the case, has the witness been offered or received any money or preferred treatment or other benefit in order to get the witness to testify, had any pressure or threat been used

This Court stated in Craig v. State, supra:

> It may be true that the prosecutor used language that was somewhat intemperate but we do not believe he exceeded the bounds of proper argument in view of the evidence. When counsel refers to a witness or a defendant as being a "liar," and it is understood from the context that the charge is made with reference to testimony given by the person thus characterized, the prosecutor is merely submitting to the jury a conclusion that he is arguing can be drawn from the evidence. It was for the jury to decide what evidence and testimony was worthy of belief and the prosecutor was merely submitting his view of the evidence to them for consideration.

Such is the case here. Contrary to Shellito's argument, the evidence supports the prosecutor's attack on Mrs. Shellito's testimony. Her testimony was not credible for a variety of reasons, which the prosecutor was entitled to present to the jury. Craig v. State, supra. The prosecutor's comments here were within the "wide latitude" allowed in arguing to the jury. Watson v. State, 651 So.2d 1159, 1163 (Fla. 1994)("wide latitude," including "any logical inferences," allowed when making legitimate arguments to the jury); Parker v. State, 641 So.2d 369, 375 (Fla. 1994) (characterizing theory of the defense as a "fantasy" was fair

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against the witness that affected the truth of the witness' testimony, did the witness at some other time make a statement that was inconsistent with the testimony the witness gave in court, was it proven that any witness had been convicted of a crime? Now, you may rely upon your own conclusion about the witness. A juror may believe or disbelieve all or any part of the evidence and testimony of any witness." (TR 1180-81).

comment on the evidence). Even if objectionable at all, the comments at issue here were not such as would generate the prejudice necessary for a finding of fundamental error. Therefore, Shellito is procedurally barred from complaining about them. Street v. State, 636 So.2d 1297, 1303 (Fla. 1994); Bonifay v. State, 21 Fla. L. Weekly S301, S302 (Fla. July 11, 1996).

This issue warrants no relief.

## ISSUE IV

BECAUSE THERE WAS NO OBJECTION AT TRIAL TO ANY PORTIONS OF THE PROSECUTOR'S SENTENCING-PHASE CLOSING ARGUMENT AT ISSUE HERE, THIS ISSUE IS NOT PRESERVED

Here, Shellito complains about various portions of the prosecutor's sentencing-phase closing arguments. Shellito fails to acknowledge that his trial counsel objected to none of the arguments at issue here, and his claim that his trial counsel objected to the remorse argument is belied by the record. Therefore, absent fundamental error, nothing raised in this issue has been preserved for appeal. It is the contention of the State that no fundamental error has been demonstrated. The State will address each portion of the prosecutor's closing argument in the same order as set forth in Shellito's brief.

A. Lack of remorse argument.

Shellito contends the trial judge incorrectly overruled his objection to the prosecutor's reference to Shellito's remorse. The State cannot agree that Shellito objected to the remorse reference. The portion of the argument he complains about occurs at the middle of T 1453. The objection he refers to occurs several paragraphs later, near the bottom of T 1454. It is obvious that the objection at T 1454 is not an objection to any reference to remorse; it is, rather, an objection to the prosecutor's description of David Wolf (a robbery victim subsequent to the murder of Sean Hathorne) as a "drug dealer" (TR 1454). There was no contemporaneous objection to the prosecutor's reference to Shellito's remorse.

Shellito, however, points out in a footnote (Initial Brief of Appellant at 46) that he had filed a written motion in limine seeking to prohibit comment on remorse, which was denied by the trial court. The State acknowledges that Shellito filed a motion in limine with reference to the penalty phase, in which he sought the prohibition of evidence or argument on a number of subjects, including: "3. Any comment on Defendant's lack of remorse." (R 324). The motion in limine provides no elaboration whatever of the seven words quoted above, and does not explain the basis of Shellito's objection. At the hearing on the motion, the trial

judge asked trial counsel for the basis of his objection. Trial counsel's sole argument in support of this portion of his motion in limine was: "Judge, I think [the prosecutor] can certainly argue the facts . . . . [H]e can infer through reasonable inferences possibly on number three. But I don't think he can come outright and say the evidence has shown that he has no lack of remorse [sic]. Because there's been no evidence of that." (TR 1223). The trial judge denied the motion as framed and argued because he "didn't know what the evidence is or what it's going to be." (TR 1223).

It is apparent that the sole basis of Shellito's in-limine objection to a possible remorse argument was that the evidence did not support such argument, not that such argument was impermissible per se. No other objection was raised at trial, and, significantly, no objection was raised to the argument actually delivered. On appeal, Shellito is attempting to attack the prosecutor's argument on a ground never raised below. It is well settled that such an attempt must fail. Steinhorst v. State, 412 So.2d 332, 338 (Fla. 1982)("Except in cases of fundamental error, an appellate court will not consider an issue unless it was presented to the lower court. [Cits.] Furthermore, in order for an argument to be cognizable on appeal, it must be the specific

contention asserted as legal ground for the objection, exception, or motion below."). Thus, absent fundamental error, this issue is not preserved for review. Pangburn v. State, supra.

The State has several bases for contending that there was no fundamental error. First of all, the State would contend that lack of remorse is simply a reasonable inference from proof that the defendant committed two violent felonies a few hours after having committed murder. Second, the State would contend that, in the context of this case, Shellito's lack of remorse was properly argued in rebuttal to defense mitigation testimony suggesting that the defendant is a loving, caring person who is incapable of committing even robbery, much less murder, and that Shellito's crime of murder was an aberrational act inconsistent with his general character. Finally, the State would contend that, in any event, any improper reference to Shellito's remorse was harmless in light of its brevity.

(1) Because the "pitiless" language was removed from the standard HAC jury instructions in 1981, this Court decided in Pope v. State, 441 So.2d 1073, 1078 (Fla. 1983), that lack of remorse was no longer relevant to the HAC factor. Furthermore, this Court observed that lack of remorse was not an aggravating factor in and of itself, and that lack of remorse often had been mistakenly

inferred from defendants' mere exercise of constitutional rights (i.e., defendant's denial of guilt showed of lack of remorse). Therefore, this Court declared: "For these reasons, we hold that henceforth lack of remorse should have no place in the consideration of aggravating factors. Any convincing evidence of remorse may properly be considered in mitigation of the sentence, but absence of remorse should not be weighed either as an aggravating factor nor as an enhancement of an aggravating factor." Ibid.

The State would note that the "pitiless" language has since been re-introduced into the HAC instruction, undercutting one of the original bases for the Pope decision. Standard Jury Instructions in Criminal Cases (1992). See Porter v. State, 564 So.2d 1060, 1063 (Fla. 1990) (citing "pitiless" element of HAC, this Court struck HAC finding where evidence did not show that defendant "meant" for murder to be deliberately and extraordinarily painful"). Moreover, the prosecutor in this case did not suggest that lack of remorse was an aggravator in and of itself, or that lack of remorse could be inferred from the mere denial of guilt or other exercise of constitutional right. Although the prohibition against the use of lack of remorse announced in Pope has since been applied generally to the penalty phase, see e.g., Sireci v. State,

587 So.2d 450, 454 (Fla. 1991); Trawick v. State, 473 So.2d 1235, 1240 (Fla. 1985), nevertheless, the State would contend that Shellito's obvious lack of remorse at having committed murder, as shown by his commission of two armed robberies just a few hours later, was properly the subject of comment in the circumstances of this case.

In Elledge v. State, 346 So.2d 998, 1001 (Fla. 1977), this Court held that it was proper to admit testimony about the details of a prior violent felony, as opposed to restricting the evidence to the bare admission of the conviction, because "the purpose for considering aggravating and mitigating circumstances is to engage in a character analysis of the defendant to ascertain whether the ultimate penalty is called for in his or her particular case." This Court stated: "Propensity to commit violent crimes surely must be a valid consideration for the jury and the judge. . . . If it be appropriate to admit the testimony, then clearly it was appropriate for the prosecutor to comment upon it in arguing for the death penalty. We do not perceive it to have been the intent of the Legislature that sentencing proceedings under Section 921,141, Florida Statutes, be as antiseptic as appellant contends." Id. at 1001-1002. Accord, Hildwin v. State, 531 So.2d 124, 127

(Fla. 1988)(at penalty phase of a capital case, "the focus is substantially directed toward the defendant's character").

If it is appropriate to admit testimony about the prior violent felonies -- and it certainly is -- it should be appropriate for the prosecutor to comment on those aspects of the defendant's character which may reasonably be inferred from the circumstances of the prior violent felonies. Elledge, supra; Slawson v. State, 619 So.2d 255, 260 (Fla. 1993) ("it is only logical that record evidence of the circumstances underlying the aggravating and mitigating factors may be considered in assigning a relative weight to each factor"); Summer v. Shuman, 483 U.S. 66, 67-68 (n. 1), 81, 107 S.Ct. 2716, 97 L.Ed.2d 56 (1987) ("Past convictions of other criminal offenses can be considered as a valid aggravating factor in determining whether a defendant deserves to be sentenced to death for a later murder," but "the inferences to be drawn concerning an inmate's character and moral culpability may vary depending on the nature of the past offense."); Terry v. State, 21 Fla. L. Weekly S9, S12 (Fla. decided January 4, 1996) (contemporaneous felony committed by codefendant with inoperable gun established prior violent felony aggravator where defendant convicted as principal before being sentenced for murder, but Court could not "ignore" contrast with cases in which defendant himself

had committed a prior violent felony; Florida's sentencing scheme not founded upon "mere tabulation" of aggravating and mitigating factors, but instead relies on the "weight of the underlying facts").

In this case the reference to remorse came during the prosecutor's argument about the subsequent robberies:

> Now, during the guilt phase of this trial I'm sure when you all deliberated and convicted the defendant were well aware that there was [sic] some gaps in time that you weren't quite sure what was going on. That's because it was not appropriate at that time to completely inform you of the defendant's activities. What happened between the time that he was bragging about the murder when he came back about 5:00, 5:30 in the morning and about 19 hours later when he was arrested and shot after assaulting a police officer with that nine millimeter, in between what was the defendant doing? Was he remorseful, was he horrified over having killed Sean Hathorne? You heard the defendant loved his family, you heard that there was good in him. If you believe his family then you would have to believe, and I'm not saying he didn't love his family, don't get me wrong, but if you believe his family you would have to believe the events you heard about were completely and utter aberration from his character.
>
> Where was the good in Michael Shellito after he murdered Sean Hathorne? He gunned the victim down around 4:00 o'clock, 4:30, Wednesday, August 31st, 18 hours later with his dream gun he pulled it on another vulnerable victim, on Kenneth Wolfenberger. . . .
>
> After Kenneth Wolfenberger, the defendant's crime continued, he goes to David Wolf. . . .
>
> When the defendant robbed David Wolf, he was showing his character, his greed, he took what he wanted.

> These crimes show the defendant's character, what do they tell you? They tell you how Michael Shellito interacts with people. [TR 1453-55]

If, as this Court has said, "the purpose for considering previous violent felony convictions is to engage in character analysis to ascertain whether the defendant exhibits a propensity to commit violent crimes," Hardwick v. State, 461 So.2d 79, 81 (Fla. 1984), the State would contend that it was logically appropriate for the prosecutor to argue that the commission of two armed robberies within 18 hours of the commission of murder showed his lack of remorse at having committed the murder. Shellito's lack of remorse was a matter logically encompassed within the relevant issue of Shellito's character, and was a reasonable inference from the established facts. See Tucker v. Kemp, 762 F.2d 1496, 1507 (11th Cir. 1985)("It has long been held that a prosecutor may argue both facts in evidence and reasonable inferences from those facts.").

This is not a case in which lack of remorse was urged as nonstatutory aggravation. Robinson v. State, 520 So.2d 1, 5-6 (Fla. 1988). Nor is it a case of attempting to use lack of remorse to prove the existence of an aggravator. Hill v. State, 549 So.2d 179, 184 (Fla. 1989). Lack of remorse did not prove the aggravator; instead, the aggravator established lack of remorse.

The nearly immediate commission of two armed robberies following the commission of murder was aggravating precisely because it demonstrated not only Shellito's propensity for violence, but also demonstrated that he was neither "remorseful" nor "horrified" by his commission of the offense of murder. This evidence showed his state of mind -- and thus, his character -- at a highly relevant time. See Barclay v. Florida, 463 U.S. 939, 103 S.Ct. 3418, 77 L.Ed.2d 1134, 1144 (1983)("It is entirely fitting for the moral, factual and legal judgment of judges and juries to play a meaningful role in sentencing"); Porter v. State, supra, 564 So.2d at 1064)(weight properly accorded to an aggravator will depend upon a consideration of the "totality of the circumstances in a case").

The prosecutor's argument on the subject of Shellito's character, including his lack of remorse, was not improper. See Tucker v. Kemp, 762 F.2d 1496, 1505 (11th Cir. 1985)("If an argument focuses on a subject appropriately within the jury's concern, it ordinarily will not be improper.").

(2) If this Court should disagree with the foregoing, however, and conclude that it would have been inappropriate for the prosecutor to have raised the issue of remorse in the first instance, the argument was nevertheless proper because it was

offered to counter the character evidence introduced by the defendant.

This Court consistently has held that evidence which otherwise might be inadmissible if offered in the first instance by the State may nevertheless be admitted to negate mitigating factors asserted by the defense. E.g., Jones v. State, 652 So.2d 346, 352-53) (Fla. 1995) (prosecutor's comment about threat to security guard during prior robbery was proper to counter defense mental-health evidence that defendant was under extreme mental or emotional disturbance at time of prior robbery); Cruse v. State, 588 So.2d 983, 991 (Fla. 1991) (evidence of lack of remorse at having shot woman was admissible to rebut defense testimony about defendant's reverent attitude toward women); Valle v. State, 581 So.2d 40, 41 (Fla. 1991) (evidence of defendant's behavior in prison, including specific acts of violence, and testimony about possibility of parole, properly admitted to rebut mitigating evidence presented by defense); Walton v. State, 547 So.2d 622, 625 (Fla. 1989) (evidence of lack of remorse properly admitted to rebut mitigating evidence of remorse presented by defendant); Jackson v. State, 530 So.2d 269, 273 (Fla. 1988) (appellant's claim that he had always been a positive influence in the lives of his children opened the door for

the State to demonstrate, with prior nonviolent felony convictions, that this had not always been the case).

The prosecutor's argument, of course, preceded the defense closing argument. Wike v. State, 648 So.2d 683, 687 (Fla. 1994) ("defendant always presents the final closing argument in the sentencing phase"). Therefore, the prosecutor could not know precisely how the defense might characterize the evidence presented in mitigation.[12] The prosecutor had heard the defense evidence, however, and was aware that the defense had presented testimony that Shellito was a loving, caring person who liked everybody, loved his family deeply and was protective of his family (TR 1357-58), that he was helpful to his sister (TR 1374), that he was easy to get along with most of the time (TR 1388), and that he was a "nice guy" (TR 1421). The evidence introduced by the defense concerning Shellito's character was sufficient to invite prosecutorial comment on Shellito's behavior following the commission of murder. A loving, caring person would have been too

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[12]Nonstatutory mitigation includes "factors too intangible to write into a statute." Gregg v. Georgia, 428 U.S. 153, 222, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976)(cited in Lockett v. Ohio, 438 U.S. 586, 606, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978)(fn. 14)). This very intangibility allows a broad range of inferences from the evidence and allows the same evidence to be described in innumerable ways.

remorseful at having committed murder to have acted as Shellito did; the fact that he committed two armed robberies soon after the murder showed that Shellito was neither a good nor a nice person, and showed that the act of murder was not an aberrational act inconsistent with his true character. The prosecutor's comments, including the reference to Shellito's lack of remorse, were within the proper scope of comment on mitigation evidence and were properly offered to refute that mitigation evidence. Cf. White v. State, 446 So.2d 1031, 1036 (Fla. 1984) (trial court's observation in sentencing order that defendant had shown no remorse was within proper scope of review of record for possible nonstatutory mitigating factors).

(3) If this Court still does not agree that the reference to Shellito's lack of remorse was proper, the State would note that the reference to remorse was very brief, and was part of an otherwise indisputably appropriate comment on the evidence. Even if the reference to remorse was objectionable, there was no fundamental error. Bonifay v. State, 21 Fla. L. Weekly S301, S302 (Fla. July 11, 1996); Sireci v. State, supra, 587 So.2d at 454.

B. Prosecutorial expertise argument.

Shellito contends here that the prosecutor improperly suggested that the prosecutor had already made the "careful decision required." Initial Brief of Appellant at 47.

In Brooks v. Kemp, 762 F.2d 1383, 1413 (11th Cir. 1985), the Eleventh Circuit Court of Appeals held that it was improper for a prosecutor to suggest that he had "canvassed all murder cases and selected this one as particularly deserving of the death penalty, thus infringing upon the jury's decisionmaking discretion and improperly invoking the prosecutorial mantle of authority." Accord, Tucker v. Kemp, 762 F.2d 1480, 1484 (11th Cir. 1985); Johnson v. Wainwright, 778 F.2d 623, 630 (11th Cir. 1985). In each of these cases, however, the prosecutor had gone further than simply to state that "we don't always seek the death penalty in every murder;" instead, the prosecutors in each of these cases had referred to their prior criminal experience and specified the frequency with which they had sought the death penalty. Brooks v. Kemp, supra at 1395 (prosecutor told jury he had been the prosecutor for seven and a half years and did not take business of asking for death penalty lightly, having "only asked for it less than a dozen times"); Tucker v. Kemp, supra at 1484 (prosecutor told jury he had been prosecutor a "number of years" and had

requested death sentence "less than a dozen times"); Johnson v. Wainwright, supra at 630 (prosecutor informed jury that he had never before asked for a death sentence).

In this case, any invocation of the prosecutorial mantle of authority is far less clear than in Brooks, Tucker, and Johnson. The more apparent purpose of the prosecutor's comments was simply to explain the concept of individualized sentencing -- as opposed to mandatory sentencing -- and to lead into a discussion of the evidence and the concept of aggravation and mitigation and the weighing process. See Donnelly v. De Christoforo, 416 U.S. 637, 647, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974) ("a court should not lightly infer that a prosecutor intends an ambiguous remark to have its most damaging meaning or that a jury, sitting through lengthy exhortation, will draw that meaning form the plethora of less damaging interpretations"). Shellito's trial counsel obviously did not infer the "most damaging meaning" from the remarks at issue here, because he interposed no objection to them. See Williams v. Kemp, 846 F.2d 1276, 1288 (11th Cir. 1988) (fact that no objection was made at trial is relevant indication that argument was not fundamentally unfair). In fact, defense counsel followed up on the remarks at issue here when he, like the prosecutor, pointed out that a death sentence was not appropriate in every case, and

reminded the jury that during the voir dire examination prospective jurors who had felt otherwise had been excused (TR 1470, 1446).

Significantly, in the very cases Shellito now relies upon (Brooks and Tucker), and, as well, in Johnson, supra, the Eleventh Circuit found no fundamental unfairness. Here, as in each of these cases, the prosecutor "laid out before the jury" (Brooks, supra at 1414) reasons for imposing a death sentence, based on facts in evidence and the application of law to those facts. Moreover, defense counsel and the trial court, in argument and charge respectively, made it "unmistakably clear" (ibid.) to the jury where the responsibility lay for rendering an advisory verdict. The jury was not misled by the remarks at issue here, and there was no fundamental error.

Absent fundamental error, this claim is not preserved for appeal.

C. Improper doubling argument.

Here, once again, Shellito is complaining about a comment to which no objection was made at trial. The State acknowledges that "it is improper to double the consideration of the aggravating circumstances of robbery and pecuniary gain when both aggravating circumstances referred 'to the same aspect of the defendant's crime.'" Robertson v. State, 611 So.2d 1228, 1233 (Fla. 1993).

However, these two aggravators were not "doubled" in this case -- they were consolidated. Jackson v. State, 498 So.2d 406, 411 (Fla. 1986) ("the consolidation of these two aggravating factors does not render the sentence invalid, in that our sentencing statute requires a weighing rather than a mere tabulation of factors in aggravation and mitigation."). The prosecutor never argued that these two factors should be given double weight, and the trial court's charge did not authorize the jury to give double consideration to the two aggravators. Instead, the prosecutor acknowledged in his argument to the jury that the robbery and pecuniary gain aggravators merged into one aggravator (TR 1452), and the trial court informed the jury: "If you find that the killing of the victim was done for financial gain and was done during a robbery or attempted robbery, then you shall consider that as only one aggravating circumstance rather than two. Those circumstances are considered to be merged into one" (TR 1506). Nor did the trial court give the two factors double weight in its sentencing order, considering them instead as "one aggravating circumstance" (R 394).

Shellito now argues that the prohibition against doubling was violated when the prosecutor argued that the merged aggravator was a "weighty" one (TR 1453). Of course, the prosecutor also argued

that the prior violent felony aggravator was "weighty" aggravating circumstance (TR 1455). Shellito's trial attorney interposed no objection to either of the prosecutor's weight arguments. Like the prosecutor, Shellito's trial counsel reminded the jury that if it found that the murder was committed for pecuniary gain and also during a robbery, the jury would "consider that as only one aggravating circumstance rather than two" (TR 1472). Furthermore, Shellito's trial counsel also addressed the question of weight, arguing that both the merged robbery/pecuniary gain aggravator and the prior violent felony aggravator should be given "little weight" (TR 1473).

Even if the prosecutor had argued both that both the robbery and the pecuniary gain aggravators could be considered independently, there would be no reversible error absent objection. Deaton v. State, 480 So.2d 1279, 1282 (Fla. 1985) (prosecutor argued both robbery and pecuniary gain aggravators, but, because trial judge properly recognized that these findings encompassed only one aggravating factor, the prosecutor's argument did not prejudice defendant). See also Suarez v. State, 481 So.2d 1201 (Fla. 1985) (absent a request for a limiting instruction, it was not reversible error when the jury was instructed on both robbery and pecuniary gain aggravators so long as the trial court did not

give the aggravating factors double weight in its sentencing order).

Here, in contrast to Deaton, the prosecutor acknowledged in his argument that the circumstances of robbery and pecuniary gain was only "one aggravating circumstance," and, in contrast to Suarez, the trial court gave the limiting instruction approved in Castro v. State, 597 So.2d 259 (Fla. 1992).

Even if the argument at issue here was objectionable for any reason, there was no impropriety so egregious as to amount to fundamental error. Therefore, this claim is not preserved for appeal.

D. Attacks on the Mitigating Evidence.

In another attack on the prosecutor's argument raised for the first time on appeal, Shellito contends the prosecutor improperly denigrated mitigating evidence. This claim is barred for failure to object below. Carter v. State, 560 So.2d 1166, 1168 (Fla. 1990) (claim that prosecutor engaged in improper argument impugning defense counsel and vouching for truthfulness of state's chief witness, barred for failure to object below).

Moreover, the prosecutor committed no impropriety here. It is true that a prosecutor should not attempt to discredit law applicable to a case, or to disparage a defense in general. Garron

v. State, 528 So.2d 353, 357 (Fla. 1988) (improper to discredit the insanity defense as a legal defense to a charge of murder, i.e., to place the issue of validity of insanity defense before the jury in the form of "repeated criticism of the defense in general"); Drake v. Kemp, 762 F.2d 1449 (11th Cir. 1985) (improper to misrepresent the law by discrediting mercy as a legally acceptable sentencing rationale). But that does not mean that a prosecutor cannot dispute the defendant's theory of the case. Valle v. State, supra, 581 So.2d at 47 (prosecutor "may properly argue that the defense has failed to establish a mitigating factor and may also argue that the jury should not be swayed by sympathy"). So long as the prosecutor's argument is based on the evidence, any difference of opinion about what the evidence shows is a matter for counter argument, not objection. Breedlove v. State, 413 So.2d 1, 8 (Fla. 1982) ("Wide latitude is permitted in arguing to a jury. [Cits.] Logical inferences may be drawn, and counsel is allowed to advance all legitimate arguments.").

With regard to matters complained of here, the prosecutor argued:

> You will probably hear some argument and you've heard some evidence regarding defendant's low intelligence, his background and why this is mitigation. I will not spend a great deal of time on the record, you will have some of them to take back with you. The

> defendant has had some difficulties, I'm not going to deny that. I'm not sure exactly to what extent they will go, you've heard some conflict in the evidence that you will have to decide on but you would not expect a Christian background of a murderer. The question is, though, do these difficulties, does this problem that has surfaced at some point in his life when you look at each of these occurrences, does it outweigh the obvious weighty aggravators in this case because that is your duty, that is what you must do. . . .
>
> We know the records say he has the average ability to reason, to organize and perceive. He knew what he was doing. And anything else that you hear about is an excuse. . . .
>
> The only evidence you got was largely from the mother, Mrs. Shellito. You recall her testimony in the guilt phase. You heard some evidence of what doctors said and you'll hear or have the records but no doctors testified. Doctors often have fancy names for insignificant problems. At the very least fancy names for problems that are not sufficient to warrant mercy, not sufficient to excuse murder and that is what you have to keep in mind.
>
> The defendant was deprived, therefore he is depraved. That is an excuse. Whatever deprivation there was his sister and brother have turned out fine. They have gone on in their lives not to be criminals, not to have prior violent crimes, not to commit murders and not to do it out of greed. One bad apple in a family is not a mitigation, ladies and gentlemen. . . .
>
> Even if there is some nonstatutory mitigation under that catch all, it does not compare to the weight and the heavy burden of those aggravating circumstances.

(TR 1464-67).

This argument contains neither misstatement of law nor fact. As for the reference to "fancy names," Defendant's exhibit 2

includes a diagnosis of Organic Mental Disorder, Conduct Disorder, Developmental Language Disorder and Developmental Reading Disorder. Reasonable people might well consider these to be "fancy names," and whether or not the problems they describe are "insignificant" or at least insufficient to outweigh the aggravating circumstances was a matter properly within the "wide latitude" allowed in closing argument. As will be further discussed in argument as to Issue VIII, no mental health expert witness testified at the penalty phase (as the prosecutor correctly noted in his argument) and the paper exhibits admitted into evidence fail to establish significant mental illness or deficiency. Furthermore, it was proper to note that Shellito came from the same family background as his brother and sister, neither of whom had turned to violent crime. Elledge v. Dugger, 823 F.2d 1439, 1447 (11th Cir. 1987) (relevant that defendant's brother and sister had emerged as "normal citizens" even though they had experienced same disadvantaged background as defendant).

The prosecutor certainly did attempt to persuade the jury that the mitigating circumstances were not strong, but he did not invite the jury to "ignore valid mitigating circumstances established by competent, uncontroverted evidence," as Shellito contends. Initial Brief of Appellant at 50. Nor did the prosecutor argue that the

law would not allow the consideration of mitigation. Valle v. State, supra, 581 So.2d at 47 (distinguishing permissible argument that jury "should not be swayed by sympathy" from argument that "the law would not allow the jury to consider sympathy"). On the contrary, the prosecutor invited the jury to consider, not ignore, the evidence, and acknowledged that it was the jury's "duty" to consider and weigh mitigating evidence.

Nothing here rises to the level of fundamental error, and this claim is procedurally barred.

E. Show-the-Defendant-the-Same-Mercy-he-Showed-the-Victim Argument.

In his final attack on the prosecutor's closing argument, Shellito complains about the show-the-defendant-the-same-mercy-he-showed-the-victim argument. Like his other complaints about the prosecutor's argument, this complaint has not been preserved for appeal by timely objection; his objection to this argument is raised for the first time on appeal.

The State acknowledges that in Rhodes v. State, 547 So.2d 1201, 1206 (Fla. 1989), this Court held that such argument is objectionable. However, unlike Shellito's trial counsel, Rhodes' trial counsel had objected to the comment at trial and had moved for a mistrial, thus preserving the issue for appeal. Even then,

this Court reversed only because the prosecutor's closing argument in Rhodes was "riddled with improper comments." Ibid. By contrast, in Richardson v. State, 604 So.2d 1107, 1109 (Fla. 1992), this Court found a show-the-defendant-no-mercy argument harmless, even though it occurred at the guilt phase of the trial -- a stage in the proceedings at which mercy was irrelevant.[13]

Although the comment at issue here was objectionable, it does not amount to fundamental error, and is therefore not preserved for appeal.

F. Harmless error.

Should this Court determine that any complaints about the prosecutor's closing argument are preserved for appeal, the State would contend that any error is harmless beyond a reasonable doubt. The State does not agree with Shellito's contention that the comment on remorse, standing alone, requires reversal. For reasons enunciated previously, the reference to remorse was not improper in this case. Even if this Court disagrees, however, Hill v. State, 549 So.2d 179, 183-84 (Fla. 1989), which Shellito relies upon, is

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[13]According to the Merriam Webster Dictionary, the definition of mercy includes: "1: compassion shown to an offender; also: imprisonment rather than death for first degree murder." Such considerations are irrelevant at the guilt phase of the trial.

distinguishable. First of all, in Hill this Court had already determined that the case was going to have to be remanded for resentencing anyway when it addressed the remorse comment. Furthermore, the prosecutor in Hill had buttressed his argument by invoking the authority of this Court and, because there was an objection, which was overruled, the prosecutor in Hill elicited the seeming approval by the trial court of the argument. Ibid. In this case, we have only the single reference to remorse, unadorned by attribution of approval by this Court, not objected to by the defense and not commented on by the trial court.

Prosecutorial argument at the penalty phase "must be egregious indeed" to warrant reversal. Bertolotti v. State, 476 So.2d 130, 133 (Fla. 1985). Accord, Rodriguez v. State, 609 So.2d 493, 501 (Fla. 1992) (only "truly egregious" prosecutorial misconduct warrants reversal of death sentence). Even if some portion of the prosecutor's argument was objectionable, and even if this Court considers any matter raised here as preserved for appeal despite the lack of any objection below, "the prosecutor's comments are not so outrageous as to taint the jury's . . . recommendation of death." Crump v. State, 622 So.2d 963, 971-72 (Fla. 1993) (prosecutor compared defense to "octopus" clouding the water in order to "slither away" and asked jury to return death sentence in

order to send a message to the community). No reversible error has been shown.

ISSUE V

BECAUSE THERE WAS EVIDENCE TO SUPPORT THE PECUNIARY GAIN AGGRAVATOR, THE TRIAL COURT DID NOT ERR IN INSTRUCTING THE JURY THEREON; FURTHERMORE, THE EVIDENCE SUPPORTS THE TRIAL JUDGE'S FINDING OF THE PECUNIARY GAIN AGGRAVATOR; BUT IN ANY EVENT, BECAUSE THE PECUNIARY GAIN AGGRAVATOR MERGED INTO THE ROBBERY AGGRAVATOR, ANY ERROR IS HARMLESS

Shellito's trial counsel objected to instructing the jury as to the pecuniary gain aggravator on the ground that there was 'no evidence of financial gain" (TR 1274). Trial counsel acknowledged that Shellito had possibly taken some 'court papers" from the victim, but argued that such papers did not amount to anything of value. The trial court overruled the objection and instructed the jury both as to pecuniary gain and robbery. As noted previously, the trial court instructed the jury that if it should find that the killing was committed for financial gain and that it was committed during a robbery or attempted robbery, the jury would "consider that as only one aggravating circumstance rather than two" (TR 1506).

Shellito contends on appeal that the evidence was insufficient to support the pecuniary gain aggravator because the evidence shows that financial gain was not the motive for the murder. Implicitly

acknowledging that pecuniary gain was the motive for the criminal episode, he nevertheless contends that the murder was an afterthought. Therefore, he contends, it was error to instruct the jury on the pecuniary gain aggravator and error for the court to find that aggravator. The State does not agree, but would contend that even if there is any error here, it is harmless because the pecuniary gain aggravator merges into the robbery aggravator.

The record shows that after stealing a gun earlier in the morning, Shellito caught a ride with Stephen Gill and Sunshine Turner. On the way to her house, Shellito exited the vehicle, claiming he needed to do some work to make money (TR 481-85). He stopped the victim at gunpoint and demanded money (TR 759). The victim told him he had no money. Shellito then "shook the guy down," looking in his pockets for "anything valuable" (TR 453-54); he found only 'legal papers" (TR 431). When the victim's body was discovered, he had no wallet and the contents of his left front pants pocket were "pulled up" and "partially exposed" (TR 603-04), indicating that it had been searched by someone before the police arrived. See (R 378-79, 394).

The cases cited by Shellito involve defendants who initiated the criminal episode for reasons other than pecuniary gain and then, as an afterthought, committed a theft only after having

murdered the victim. Shellito, by contrast, clearly had a pecuniary motive at the outset of this criminal episode.

This Court has approved the pecuniary gain aggravator when pecuniary gain "was a concurrent though not exclusive motive for the criminal episode resulting in the murder." Bates v. State, 465 So.2d 490, 496 (Fla. 1985) (Boyd, Chief Justice, concurring in part and dissenting in part) (concurring with majority that pecuniary gain aggravator was properly found). There can be no reasonable doubt but that Shellito was motivated by the prospect of financial gain when he accosted the victim, and that financial gain was a motive for the criminal episode resulting in the murder even if Shellito shot the victim only after learning that he had no money.

This Court also has held that "every robbery necessarily involves pecuniary gain." Toole v. State, 479 So.2d 731, 733 (Fla. 1985). See Larkins v. State, 655 So.2d 95, 100 (Fla. 1995) (trial court entitled to rely on evidence of robbery to find pecuniary gain, even if Larkins may have fired gun from stress). Pecuniary motive may be established even though the defendant ultimately did not profit from the murder. Porter v. State, 429 So.2d 293, 296 (Fla. 1983) (pecuniary gain properly found even though defendant threw away property he stole from murder victims). In fact, this Court has held that the pecuniary gain factor may be found even if

"the robbery was never completed so long as there was an attempt." Fitzpatrick v. State, 437 So.2d 1072, 1078 (Fla. 1983). There can be no reasonable doubt but that this murder occurred during the commission of robbery or attempted robbery.

For these reasons, the trial judge did not err in instructing the jury on the pecuniary gain aggravator or in finding the aggravator himself.

Even if the finding is error, however, it is harmless. The pecuniary gain aggravating factor was merged into the robbery aggravator, and considered as only one aggravating circumstance. Eliminating the pecuniary gain aspect of the merged aggravator would not effect any reduction in the number of aggravating circumstances; with or without pecuniary gain, there are two aggravating circumstances in this case -- the robbery aggravator into which the pecuniary gain circumstances would have to merge in any event, and the prior violent felony aggravator. Eliminating pecuniary gain would not in reasonable likelihood have produced a different sentence. Geralds v. State, 674 So.2d 96, 104-05 (Fla. 1996) (no reasonable likelihood of different sentence where striking an aggravator left two aggravators to be weighed against a statutory mitigator and three nonstatutory mitigators).

## ISSUE VI

THE TRIAL COURT'S INSTRUCTIONS CONCERNING MITIGATION WERE SUFFICIENT; SHELLITO'S REQUESTED INSTRUCTIONS WERE PROPERLY REFUSED

Shellito contends that the standard penalty phase instructions delivered by the trial court were insufficient to guide the jury in its consideration of mitigating factors. He contends the court should have defined mitigating circumstances, explained to the jury that the procedure to be followed is not a mere counting process, and enumerated specific non-statutory mitigating circumstances. He concedes that this Court repeatedly has declined to require such instructions. See, e.g., Finney v. State, 660 So.2d 674 (Fla. 1995) (this Court has repeatedly rejected claim that trial court must give specific instructions on non-statutory mitigating circumstances urged by defendant); Gamble v. State, 659 So.2d 242 (Fla. 1995) (this Court has repeatedly upheld validity of standard jury instructions; trial court need not define mitigating circumstances for jury); Ferrell v. State, 653 So.2d 367 (Fla. 1995) (standard instructions sufficient; trial court need not tell jury that death penalty is reserved for most aggravated and least mitigated murders, tell jury that each juror should individually consider mitigation evidence, provide definition of mitigating circumstances, or specify non-statutory mitigating circumstances);

Jones v. State, 652 So.2d 346 (Fla. 1995) (nonstatutory mitigators need not be specified in charge); Jones v. State, 612 So.2d 1370 (Fla. 1992) (standard instruction on nonstatutory mitigators is sufficient; no need to give separate instructions on individual items of nonstatutory mitigation); Robinson v. State, 574 So.2d 108 (Fla. 1991) (no error in refusing to instruct jury on specific nonstatutory mitigating circumstances; standard instruction on nonstatutory mitigation does not denigrate importance of nonstatutory mitigating circumstances); and Carter v. State, 576 So.2d 1291 (Fla. 1989) (standard instruction sufficient to alert jury to consider nonstatutory mental health evidence in mitigation). The State would rely on these precedents from this Court to contend that no error occurred here.[14] The standard penalty phase instructions delivered by the trial court were correct and sufficient.

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[14]Since Shellito cites Spivey v. Zant, 661 F.2d 464 (5th Cir. Unit B 1981), the State would note that the state trial court in that case had not even mentioned "mitigating circumstances" in his charge to the jury. In Peek v. Kemp, 784 F.2d 1479, 1494 (11th Cir. 1986), the Eleventh Circuit rejected 'the notion that the Constitution requires that the jury instructions include any particular words or phrases to define the concept of mitigation or the function of mitigating circumstances."

## ISSUE VII

THE STANDARD PENALTY-PHASE INSTRUCTION DELIVERED BY THE TRIAL COURT WAS NOT IMPROPERLY BURDEN-SHIFTING

Shellito contends the standard penalty-phase jury instructions are impermissibly burden-shifting. Citing Aranso v. State, 411 So.2d 172, 174 (Fla. 1982), he argues that if the standard instructions place any burden of persuasion on the defendant, they violate due process principles enunciated in Mullaney v. Wilbur, 421 U.S. 684, 95 S.Ct.. 1881, 44 L.Ed.2d 508 (1975). Regardless of what this Court might have thought in 1982, however, it is now clear that so long as a State's method of allocating the burdens of proof does not lessen the State's burden "to prove the existence of aggravating circumstances, a defendant's constitutional rights are not violated by placing on him the burden of proving mitigating circumstances sufficiently substantial to call for leniency." Walton v. Arizona, 497 U.S. 639, 650, 110 S.Ct. 3047, 111 L.Ed.2d 511 (1990).

Shellito cites no Florida cases in which the standard penalty phase instructions have been found to have shifted the burden of proof unconstitutionally, and arguments similar to the one made here have been rejected repeatedly by the Eleventh Circuit Court of

Appeals. For example, in Bertolotti v. Dugger, 883 F.2d. 1503, 1525 (11th Cir. 1989), the court held:

> The jury was not instructed that it should presume death to be the appropriate penalty once an aggravating circumstance was established. . . . Rather, Bertolotti's jury was instructed that it must find an aggravating circumstance beyond a reasonable doubt before it need consider mitigating circumstances, and even then it need not look for mitigating circumstances if it found that the "aggravating circumstances do not justify the death penalty." If the jury did find that the aggravating circumstances justified the death penalty, it was to determine whether *any* other aspect of Bertolotti's record or character or offense stood in mitigation of his crime. This set of instructions adequately described the plan of Florida's capital-sentencing statute [as approved in] Proffitt v. Florida, 428 U.S. 242, 248-51, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976).

Since Bertolotti was decided, the Eleventh Circuit consistently has held that there is no impermissible burden-shifting in Florida's standard jury instructions at the penalty phase. See, e.g., Henderson v. Dugger, 925 F.2d 1309, 1317-18 (11th Cir. 1991); Jones v. Dugger, 928 F.2d 1020, 1029-30 (11th Cir. 1991); Kennedy v. Duaaer, 933 F.2d 905, 915-16 (11th Cir. 1991) (noting that even if jury instructions placed on defendant the burden to prove that mitigating factors outweighed aggravating factors, under Walton v. Arizona, supra, there was no constitutional error).

Shellito also complains about the prosecutor's argument. There was no objection at trial to that portion of the prosecutor's argument cited here.[15] He is therefore procedurally barred from complaining about the argument. Moreover, it is difficult to see how argument by the prosecutor, proper or otherwise, could invalidate a correct charge. To the extent that the argument is independently reviewable for fundamental unfairness, the State would contend that there was none. Under the applicable statutes, the State bears the burden of proving the existence of aggravating circumstances beyond a reasonably doubt, while the defendant bears the burden to prove mitigating circumstances by a preponderance of the evidence. Walls v. State, 641 So.2d 381, 390 (Fla. 1994). Furthermore, "[w]hen one or more of the aggravating circumstances is found, death is presumed to be the proper sentence" unless the aggravators are 'overridden" by the mitigators. Dixon v. State, 283 So.2d 1, 9 (Fla. 1973). See Blystone v. Pennsylvania, 494 U.S. 299, 110 S.Ct. 1078, 108 L.Ed.2d 255 (1990) (Pennsylvania death penalty statute mandating death sentence if jury finds at least one

[15]The only objection interposed at trial to the prosecutor's argument occurred when the prosecutor's referred to one of Shellito's armed robbery victims as a "drug dealer" (TR 1454).

aggravating circumstance and no mitigating circumstances held to satisfy requirements of Eighth Amendment).

Neither the trial court's instructions nor the prosecutor's argument deprived Shellito of due process or a fair sentencing proceeding.

## ISSUE VIII

### THE TRIAL COURT DID NOT ERR REVERSIBLY IN ITS CONSIDERATION OF MITIGATING EVIDENCE

Shellito contends here that the trial court evaluated the mitigating circumstances improperly. It is, of course, well settled that it is within the purview of the trial court to determine whether particular mitigating circumstances have been proven and the weight to be given to them. Bonifay v. State, 21 Fla. L. Weekly S301 (Fla. July 11, 1996) (decision as to whether a mitigating circumstance has been established, and the weight to be given to it if it is established, are matters within the trial court's discretion); Foster v. State, 654 So.2d 112, --- (Fla. 1995) (it is within purview of trial court to determine whether particular mitigating circumstance was proven and weight to be given to it); Wyatt v. State, 641 So.2d 355 (Fla. 1994) (decision whether any mitigating circumstances had been established was within trial court's discretion); Arbelaez v. State, 626 So.2d 169

(Fla. 1993) (trial court has broad discretion in determining applicability of mitigating circumstances); Hall v. State, 614 So.2d 473 (Fla. 1993) (decision as to whether mitigating circumstances have been established is within trial court's discretion); Lucas v. State, 613 So.2d 408 (Fla. 1992) (it is within trial court's discretion to decide whether mitigator has been established, and court's decision will not be reversed merely because defendant reaches different conclusion); Preston v. State, 607 So.2d 404 (Fla. 1992) (same); Sireci v. State, 587 So.2d 450 Fla. 1991) (same). There was no abuse of discretion here.

A. Age. The trial court's sentencing order recites that Shellito was 19 years old at the time of the murder and was 'now" (at the time of sentencing) 20 years old (R 395). Shellito now complains that this finding was factually erroneous because he was only 18 at the time of the crime. The State would note that Shellito's trial counsel argued to the jury that Shellito's "young **age** of 19" was a statutory mitigator (TR 1494). To the judge, Shellito's trial counsel argued in mitigation that Shellito **was "19** years old and basically is not ever going to be released from prison" (TR 1538). Shellito's appellate counsel does not cite any portion of the record to support his claim that in fact Shellito was only 18 at the time of the crime. However, the State will

acknowledge that the school records in Defendant's exhibit 1 show a date of birth of 10/07/75. If this information is accurate, Shellito was just over one month short of his 19th birthday when he committed the murder on August 31, 1994. He was, however, 20 years old at the time of the sentencing (October 20, 1995), as the trial court's sentencing order states.

The trial court's slight error (if such it was) in stating the age of the defendant at the time of the crime is understandable in light of the arguments presented by trial counsel, and of no real significance in view of the fact that Shellito was only a month short of being 19 at the time of the crime.

Moreover, Shellito's documented criminal record, his experience with the criminal justice system, and his independent lifestyle demonstrate that Shellito was no young innocent who was briefly led astray; he was and is a career criminal whose behavior shows an escalating pattern of violence. The trial judge committed no abuse of discretion in assigning only slight weight to Shellito's age. Cooner v. State, 492 So.2d 1059, 1062-63 (Fla. 1986) (trial judge acted within discretion in rejecting age of 18 as mitigating); Kokal v. State, 492 So.2d 1317, 1319 (Fla. 1986) (age of 20 properly rejected as mitigating).

B. Nonstatutory mitigation. Shellito argues that the trial court erred in failing to expressly evaluate his proposed mitigating factors. He contends, for example that the trial court should specifically have addressed Shellito's 'organic brain damage," "severe learning disabilities," and "borderline intelligence." Shellito's trial counsel, however, did not specifically identify any of these factors, or at least he did not do so in the precise language proffered on appeal.

Trial counsel did submit a proposed jury instruction which included a list of nonstatutory mitigating factors for the jury to consider (R 336). Although this list mentions "low level of intelligence and comprehension," there is no mention of "organic brain damage" or "borderline" intelligence. Instead of the 'severe learning disabilities" mentioned on appeal, the proposed jury instruction refers to "a learning disability" (R 336). In argument to the jury, Shellito's trial counsel referred to most of the factors listed in the proposed jury instruction. However, he specifically abandoned any claim that Shellito was a good prospect for rehabilitation (TR 1497-98), and the trial court ruled that he could not argue lingering doubt (TR 1500). At the sentencing hearing before the court, trial counsel did not provide a list of specific nonstatutory mitigators, but did present argument as to

mitigation without, however, mentioning 'organic brain damage," "borderline intelligence," or "severe" learning "disabilities" (TR 1540-41).

The State does not mean to quibble over terminology here. Trial counsel did argue low intelligence, lack of education and "a" learning disability. Ibid. But Shellito's complaint on appeal is premised on the notion that, because the trial court did not use certain, specific terminology to address the evidence offered in mitigation, the trial court did not properly consider that evidence. But the fact is that trial counsel and appellate counsel themselves have not consistently used the same terminology to describe the defense evidence; although in every instance trial counsel and appellate counsel are addressing the same evidence, the characterization of the nonstatutory mitigation has differed at least to some extent every time it has been described.[16]

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[16]For instance, Shellito's trial counsel contended that Shellito's good employment history should be considered in mitigation (R 336). The trial court found that Shellito "seldom worked" and got money from his mother (R 397). Shellito's appellate counsel does not mention his employment history, but contends the trial court should have addressed Shellito's good deeds in helping a blind man and also a friend whose parents had rejected him. These good deeds were not mentioned in Shellito's list of nonstatutory mitigators contained in his proposed penalty phase jury instruction (R 336). Nor were they mentioned in argument to the trial court at sentencing (TR 1532-43).

The State has noted previously that nonstatutory mitigation includes 'factors too intangible to write into a statute," footnote 12, post (quoting the United States Supreme Court), and that "[t]his very intangibility allows a broad range of inferences from the evidence and allows the same evidence to be described in innumerable ways." Ibid. For this reason, at the sentencing hearing before the trial court, it is incumbent for the defense to identify for the trial court specific nonstatutory mitigating circumstances it is trying to establish. Hodges v. State, 595 So.2d 929, 934-35 (Fla. 1992). If trial counsel fails to do so, this Court "will not fault the trial court for not guessing which mitigators" the defendant will 'argue on appeal." Id. at 935.

It is obvious from any fair reading of the trial judge's sentencing order that he considered the nonstatutory mitigating evidence that Shellito's trial counsel presented. That order, of course, may be parsed endlessly for specific terms and phraseology omitted from the order, but the sentencing order must, of necessity, be a summary, not a verbatim account, of the evidence in migitation. The trial court's sentencing order in this case is a fair summary of the evidence presented and argued in mitigation.

Contrary to Shellito's contention, the record most emphatically does not demonstrate that he suffers from organic

brain damage. That Shellito contends he does, based apparently on a reference in Defendant's exhibit 2 to an "organic mental disorder," demonstrates the necessity for this precautionary statement in the Diagnostic and Statistical Manual for Mental Disorders, Fourth Edition 1994, published by the American Psychiatric Association (hereafter DSM-IV), Introduction at p. xxiii:

> "The diagnostic categories, criteria, and textual descriptions are meant to be employed by individuals with appropriate clinical training and experience in diagnosis. It is important that DSM-IV not be applied mechanically by untrained individuals."

The "organic mental disorder" referred to in Defendant't Exhibit 2 is "Conduct Disorder." It should be noted, first, that inclusion of a disorder in the classification "does not carry any necessary implications regarding the causes of the individual's mental disorder" or imply "knowledge about its etiology." Id., Introduction at p. xxiii. In other words, the 1991 diagnosis of "organic mental disorder" does not imply organic brain damage. Moreover, the term "organic" mental disorder is no longer used in the DSM-IV and would not be used today. Id, Use of the Manual at p. 10. Second, the diagnostic criteria for Conduct Disorder include aggression to people and animals, destruction of property, deceitfulness or theft, and serious violations of rules. Id. at p.

90. "The essential feature of Conduct Disorder is a repetitive and persistent pattern of behavior in which the basic rights of others or major age-appropriate societal norms or rules are violated." Id. at p. 85.[17] In short, the essential feature of Conduct Disorder is criminal behavior.

Significantly, no mental health expert testified at trial to explain the significance or limitations of the diagnosis of Conduct Disorder. The DSM-IV cautions:

> When the DSM-IV categories, criteria, and textual descriptions are employed for forensic purposes, there are significant risks that diagnostic information will be misused or misunderstood. These dangers arise because of the imperfect fit between the questions of ultimate concern to the law and the information contained in a clinical diagnosis. *In most situations, the clinical diagnosis of a **DSM-IV** mental disorder is not sufficient to establish the existence for legal purposes of a "mental disorder," "mental disability," "mental disease," or "mental defect."*

Id. Introduction at p. xxiii (emphasis supplied). Moreover, there is 'no assumption that all individuals described as having the same mental disorder are alike in all important ways." Id. at p. xxii. 'It is precisely because impairments, abilities, and disabilities vary widely within each diagnostic category that assignment of a

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[17]A diagnosis of conduct disorder generally would not apply to a person over the age of **18**. Ibid. Persons with conduct disorder often mature into adults with anti-social personality disorder. Id. at p. 89.

particular diagnosis does not imply a specific level of impairment or disability," Id. at xxxiii. Nor does a particular diagnosis "carry any necessary implication regarding the individual's degree of control over the behaviors that may be associated with the disorder." Ibid.

In Kight v. State, 512 So.2d 922, 931 (Fla. 1987), this Court stated: "As lay people we could guess that almost everyone who commits crimes against society must have some psychiatric or psychological problem." When the very concept of mental disorder is defined to include, inter alia, a pattern of behavior that carries with it 'a significantly increased risk of suffering . . . an important loss of freedom," DSM-IV, supra, Introduction at xxi, then all repeat offenders might well qualify for a diagnosis of a mental disorder. Such disorders, however, do not necessarily amount to a mental illness, DSM-IV, supra, or mitigate an aggravated murder. Walls v. State, 641 So.2d 381, 390 (fn. 7) (Fla. 1994) ("It is perhaps true that some aspects of psychological science today treat criminal predisposition or criminal intent as a mental derangement. The law, however, is more exacting.").

While the record does include a reference to a diagnosis of "Conduct Disorder," there is no testimony or other indication in the record that this disorder could properly be characterized as a

mental illness, and the trial court was correct in concluding that there has been no "specific diagnosis of mental illness or other disabling conditions" (R 398).

As for Shellito's alleged borderline intelligence, his own evidence -- the school records introduced into evidence by the defense -- show that although his IQ and achievement test scores varied from one test to another, Shellito's intelligence is not borderline; it is in the low average to average range, in the opinion of the very persons who administered the tests. Furthermore, Shellito's brother testified that the defendant was 'very quick on learning things" (TR 1357), and his father testified that Shellito had strong mechanical abilities (TR 1399). Although the school records indicate that Shellito had reading difficulties, his own mother testified that he could write well (TR 1430). In any event, the school records alone support the trial court conclusion that "Much of the defendant's school problems were behavorial [sic]" (R 397).

As for Shellito's other mitigation evidence, Shellito acknowledges that the trial court found as a fact that Shellito had used drugs and alcohol since an early age. Furthermore, the trial court's finding that Shellito 'was raised in a stable, lower middle class home with his mother, older sister and brother" is supported

by the evidence. The State does not agree that how Shellito's brother and sister turned out is "totally irrelevant," as Shellito contends. Initial Brief of Appellant at 83. Elledge v. Dugger, 823 F. 2d 1439 (11th Cir. 1987) (proper to use against defendant fact that siblings had emerged as normal citizens even though they had been subjected to same family background as defendant). Shellito's background may not have been perfect, but his parents remained together throughout his childhood, and his father has always made a decent living. As a career Navy man, Shellito's father may have been absent more than some, but he certainly did not abandon the family. Although Shellito's sister testified that he had been abused by his father, the record does not demonstrate such; although there were a couple of physical confrontations between Shellito and his father, in at least one instance, his father was merely protecting the mother from Shellito's own potential violence.

Shellito points out elsewhere in his brief (Initial Brief of Appellant at 69) that the trial court evaluated all of the nonstatutory mitigation under the so-called catchall mitigator in which the jury is instructed to consider any other factors that would mitigate against a death sentence. The State would note that this Court approved such procedure in Hodges v. State, supra, 595

So.2d at 934-35. As in Hodges, it is obvious that the trial court considered all of the nonstatutory mitigating evidence that Shellito presented.

As this Court has noted, there are "no hard and fast rules about what must be found in mitigation in any particular case . . . . Because each case is unique, determining what evidence might mitigate each individual defendant's sentence must remain with the trial court's discretion," Lucas v. State, 568 So.2d 18 (Fla. 1990). So long as the trial court considers all of the evidence, the decision as to whether a mitigating circumstance has been established, and the weight to be given to it if it is established, are matters within the trial court's discretion. Bonifay v. State, 21 Fla. L. Weekly S301 (Fla. July 11, 1996).

The trial court committed no abuse of discretion in this case. See Kight v. State, supra, 512 So.2d at 933 (no error in trial court's failure to find Kight's low IQ and history of abusive childhood as non-statutory mitigating factors); Kight v. Sinsletary, 50 F.3d 1539, 1548 (11th Cir. 1995) (no error in trial court's failure to find that Kight's mental retardation and childhood abuse were mitigating factors; sentencer must consider mitigating factors, but need not accept them); Jones v. State, 652 So.2d 346, 351 (Fla. 1995) (where defendant's mother was unable to

care for him but left him in the care of relatives who could, 'court did not abuse its discretion by refusing to find in mitigation that Jones was abandoned by an alcoholic mother"); Sochor v. State, 619 So.2d 285, 293 (Fla.d 1993) (deciding whether family history establishes mitigating circumstances is within the trial court's discretion); Valle v. State, 581 So.2d 40, 48-49 (Fla. 1991) (trial court properly weighed and rejected evidence of dysfunctional family and abusive childhood as mitigating factors).

Should this Court determine that the trial court's sentencing order contains any error or omission, the State would contend that it would be harmless beyond a reasonable doubt. Substantial, competent evidence supports the trial court's determination as to the nonstatutory mitigation the trial court specifically addressed, and no other circumstances are present in the record that would strongly mitigate Shellito's conduct. Wickham v. State, 593 So.2d 191 (Fla. 1991); Cook v. State, 581 So.2d 141 (Fla. 1991); Zeisler v. State, 580 So.2d 127, 130-31 (Fla. 1991); Rogers v. State, 511 So.2d 526 (Fla. 1987). Therefore, the trial court's judgment should be affirmed.

## ISSUE IX

SHELLITO'S DEATH SENTENCE IS PROPORTIONATE TO THE PENALTY IMPOSED IN OTHER CASES

Shellito contends the death penalty is not an appropriate sentence for someone who, while on parole after having committed a violent felony, steals a gun, and then uses that gun to commit three armed robberies, one murder, and an aggravated assault on a police officer while resisting arrest. The State does not agree.

Shellito contends the merged robbery/pecuniary gain aggravator is the "weakest aggravating circumstance of all." Initial Brief of Appellant at 86. Indirectly, Shellito raises an 'automatic aggravating circumstance" argument which has been rejected repeatedly by this Court. Stewart v. State, 588 So.2d 972, 973 (Fla. 1991); Engle v. Duaaer, 576 So.2d 696, 704 (Fla. 1991); Squires v. State, 450 So.2d 208, 221 (Fla. 1984). The State would note that robbery with a firearm is itself a first degree felony, punishable by up to life imprisonment. §§ 812.13, 775.082, 775.083, 775.084, Fla. Laws (1992).[18] An offender who has committed murder during the commission of a robbery therefore has committed two very serious offenses. The commission of an additional serious offense

[18]The offense of robbery with a firearm is defined to include attempted robberies with a firearm. § 812.13 (2) (a), (3)(a).

in addition to murder is a factor which narrows the class of persons eligible for the death penalty. Furthermore, the fact that this murder involved the contemporaneous commission of the serious offense of robbery with a firearm, in addition to murder, reasonably justifies a more severe penalty for the murder. The contemporaneous felony aggravator fully meets the test of a valid aggravator. Zant v. Stephens, 462 U.S. 862, 877, 103 S.Ct.2733, 77 L.Ed.2d 235 (1983) ("To avoid this constitutional flaw [of arbitrary and capricious sentencing], an aggravating circumstance must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder."); Lowenfield v. Phelps, 484 U.S. 231, 108 S.Ct. 546, 98 L.Ed.2d 568 (1988) (by finding "at least one aggravating circumstance" before imposing a death sentence, the sentencer "narrows the class of persons eligible for the death penalty according to an objective legislative definition;" fact that 'the aggravating circumstance duplicate[s] one of the elements of the crime" does not make the death sentence constitutionally infirm).

Armed robbery is a seriously antisocial act. Murders committed during armed robberies by their nature tend to be some of the most cold-blooded of all murders, because, as is the case here,

they generally are committed against strangers who have given the defendant not even a pretense of moral or legal justification to kill. Moreover, "the possibility of bloodshed is inherent in the commission of any violent felony and this possibility is generally foreseeable and foreseen; it is one principal reason that felons arm themselves." Tison v. Arizone, 481 U.S. 137, 151, 107 S.Ct. 1676, 95 L.Ed.2d 127 (1987). The legislature was amply justified in providing that the contemporaneous commission of robbery can justify a death sentence for murder. The State does not agree with Shellito's contention that the contemporaneous commission of a robbery is a 'weak" aggravator.

Moreover, it is not accurate to characterize the contemporaneous commission of a felony and a murder as being always a "felony murder." This is not a case in which the victim was killed unintentionally during a robbery. Nor is this a case in which a robbery victim provoked the defendant, threatened the defendant, or attempted physically to resist the defendant. The victim offered no resistance; Shellito simply told him he was "out of gas," aimed his newly acquired gun at the victim, and shot him in the heart. Shellito was not given a death sentence for 'felony murder simpliciter," Tison, supra, 481 U.S. at 155; he was given a

death sentence on the basis of an intentional killing during the commission of an armed robbery.[19]

In addition to the robbery/pecuniary gain aggravator, the trial found the prior violent felony aggravator. Shellito concedes that this finding was proper, Initial Brief of Appellant at 86, but argues that the commission of three additional violent felonies within 20 hours of the murder was an aberration in his life and does not demonstrate an "unalterable propensity for violence." Initial Brief of Appellant at 87. Initially, the State has difficulty discerning the distinction between a claim that Shellito's demonstrable propensity for violence is not

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[19]The State would add this observation from Tison, 481 U.S. at 157: "A narrow focus on the question of whether or not a given defendant 'intended to kill,' however, is a highly unsatisfactory means of definitively distinguishing the most culpable and dangerous of murderers. Many who intend to, and do, kill are not criminally liable at all -- those who act in self-defense or with other justification or excuse. Other intentional homicides, though criminal, are often felt undeserving of the death penalty -- those that are the result of provocation. On the other hand, some nonintentional murderers may be among the most dangerous and inhumane of all -- the person who tortures another not caring whether the victim lives or dies, or the robber who shoots someone in the course of the robbery, utterly indifferent to the fact that the desire to rob may have the unintended consequence of killing the victim as well as taking the victim's property. This reckless indifference to the value of human life may be every bit as shocking to the moral sense as an 'intent ot kill.' Indeed, it is for this very reason that the common law and modern criminal codes alike have classified behavior such as occurred in this case along with intentional murders."

'unalterable" and a claim that he can be rehabilitated. The State would note that Shellito's trial counsel specifically waived any reliance on a potential-for-rehabilitation nonstatutory mitigator (TR 1497), thereby precluding the State from offering evidence that Shellito had committed three batteries on correctional officers since he had been in jail (TR 1497). The State would contend that it is too late for Shellito now to contend that his propensity for violence is 'unalterable."

In any event, Shellito's crime spree during a 24 hour period in which he broke into a truck to steal his 'dream" gun and then used that gun to commit a murder, three armed robberies and an aggravated assault on a police officer more than amply demonstrate his propensity for violence. The fact that these events occurred while he was on probation for an aggravated assault corroborates his propensity for violence. Furthermore, his demonstrated history of criminal behavior, which includes four felony convictions as a juvenile and eight felony convictions as an adult (R 395), belie any notion that the crime spree of August 30-September 1, 1994, **was** an "aberration in appellant's life." Initial Brief of Appellant at 87.

The jury override cases and the domestic case cited by Shellito are inapposite.[20] So is Kramer v. State, 619 So.2d 274 (Fla. 1993), in which the evidence showed no more than a spontaneous fight between two drunks, and Livingston v. State, 565 So.2d 1288 (Fla. 1988), in which the defendant was a minor.

In this case the jury recommended a death sentence by an eleven to one vote. The death penalty imposed by the trial court is consistent with this Court's prior decisions. This is the kind of case in which the death penalty is properly imposed. Geralds v. State, 674 So.2d 96 (Fla. 1996) (death sentence proportionate when two aggravators weighed against one statutory and three nonstatutory mitigators); Finney v. State, 660 So.2d 674 (Fla. 1995) (death penalty for conviction for first degree felony murder with robbery as underlying felony was proportionately warranted); Bunter v. State, 660 So.2d 244 (Fla. 1995) (death penalty warranted where there were two aggravators -- prior violent felony conviction and capital felony committed during a robbery -- and ten nonstatutory mitigators); Gamble v. State, 659 So.2d 242 (Fla.

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[20] Wilson v. State, 493 So.2d 1019 (Fla. 1986) involved a murder committed furing a domestic dispute. Although Shellito fails to acknowledge it, Fead v. State, 512 So.2d 176 (Fla. 1987) is a jury override cases, as are the two acknowledged override cases, i.e., Brown v. State, 526 So.2d 903 (Fla. 1988) and Cochrane v. State, 547 So.2d 928 (Fla. 1989).

1995) (death sentence proportionate where there were two aggravators, one statutory mitigator and several nonstatutory mitigators); Hayes v. State, 581 So.2d 121 (Fla. 1991) (two aggravating factors weighed against mitigators of low age, low intelligence, learning disability and deprived environment); Freeman v. State, 563 So.2d 73 (Fla. 1990) (two aggravators weighed against low intelligence and abused childhood); Kight v. State, 512 So.2d 922 (Fla. 1987) (two aggravators versus evidence of mental retardation and deprived childhood).

## CONCLUSION

WHEREFORE, for all of the foregoing reasons, the State of Florida respectfully asks this Honorable Court to affirm the judgment of the court below in all respects.

Respectfuly submitted

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Nada M. Carey, Assistant Public Defender, Leon County Courthouse, Fourth Floor North, 301 South Monroe Street, Tallahassee, Florida 32301, this 18th day of November, 1996.

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